Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JIMMY V. DUNN, *et al.*,
Petitioners,

v.

NETCO, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

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PETITION FOR A WRIT OF CERTIORARI

LARRY K. BRATVOLD
BRATVOLD LAW FIRM, P.C.
1200 East Woodhurst Drive
Building H, Suite 400
Springfield, MO 65804
(417) 887-5300

GASPARE J. BONO
Counsel of Record
STEPHEN CHIPPENDALE
MINDY L. CAPLAN
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

In applying the Federal Arbitration Act, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (internal quotation omitted).

The question presented is:

Is there a legal presumption that such "clear and unmistakable evidence" exists if an arbitration agreement expressly incorporates nationwide rules, adopted by the American Arbitration Association and similar well-respected arbitration organizations, providing the arbitrator with sole authority to determine the "existence," "scope," and "validity" of the agreement?

The identical question is before the Court in a petition for a writ of certiorari in the companion case of *Dunn v. Nitro Distributing, Inc.* (filed September 26, 2006).

LIST OF PARTIES

All parties do not appear in the caption on the cover page. A list of all parties to the proceeding in the Missouri Supreme Court is as follows:

Appellants*

Jimmy V. Dunn

Jimmy V. Dunn & Associates, Inc.

Billy S. Childers

TNT, Inc. of Charlotte, North Carolina (TNT)

Harold (Hal) Gooch, Jr.

Gooch Support Systems, Inc.

Gooch Enterprises, Inc.

Jim Evans

J.L. Evans & Associates, Inc.

Pro Net Global Association, Inc.

Global Support Services, Inc.

Respondents

Netco, Inc.

Schmitz & Associates, Inc.

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* All appellants below are petitioners in this Court with the exception of Jim Evans and J.L. Evans & Associates, Inc.

RULE 29.6 STATEMENT

No petitioner has a parent corporation, and no publicly held company owns 10 percent or more of a petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 STATEMENT	iii
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	3
B. The Two Arbitration Agreements	4
C. This Litigation	5
D. The Opinion of the Supreme Court of Missouri	6
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	9
APPENDIX A (June 30, 2006 Opinion)	1a
APPENDIX B (April 15, 2005 Opinion)	15a
APPENDIX C (September 17, 2003 Opinion and January 22, 2004 Order)	33a
APPENDIX D (9 U.S.C. §§ 2-4)	37a

TABLE OF CONTENTS—Continued

Page

APPENDIX E
(Excerpts of petitioners' brief to trial court)..... 39a

APPENDIX F
(Excerpts of petitioners' brief to court of appeals).... 45a

APPENDIX G
(Excerpts of petitioners' reply brief to court of appeals)..... 51a

APPENDIX H
(Excerpts of petitioners' brief to supreme court)..... 55a

APPENDIX I
(Excerpts of petitioners' reply brief to supreme court)..... 62a

APPENDIX J
(Pro Net arbitration agreement)..... 64a

APPENDIX K
(Amway distributorship agreement)..... 74a

APPENDIX L
(Excerpts of Rule 11 of the Amway Rules of Conduct) 76a

APPENDIX M
(Rule R-7 of the AAA Rules)..... 78a

APPENDIX N
(Rule 11 of the JAMS Rules) 79a

TABLE OF AUTHORITIES

CASES Page

Nitro Distributing, Inc. v. Dunn,
194 S.W.3d 339 (Mo. banc 2006) ..... *passim*

Southland Corp. v. Keating,
465 U.S. 1 (1984) 2

STATUTES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000). *passim*

28 U.S.C. § 1257 2

MISCELLANEOUS

American Arbitration Association, Commercial Arbitration Rules ..... *passim*

Judicial Arbitration and Mediation Services, Comprehensive Arbitration Rules and Procedures ..... *passim*

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No. ___

JIMMY V. DUNN, *et al.*,
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NETCO, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby petition for a writ of certiorari to review the judgment of the Supreme Court of Missouri, which applied the Federal Arbitration Act to two arbitration agreements. This case presents the question of whether an arbitrator, not a court, should determine arbitrability issues when an arbitration agreement incorporates standard nationwide rules providing that the arbitrator should determine the "existence," "scope," and "validity" of the agreement.

The same issue is before this Court in another case decided on the same day by the Supreme Court of Missouri, *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. banc 2006) (hereinafter "*Nitro*"). In its decision in this case, the Supreme Court of Missouri designated *Nitro* as a "companion case involving most of the same issues." (Pet. App. 1a.) A petition for a writ of certiorari was filed in *Nitro* on September 26, 2006.

Because *Nitro* is the lead case on the issue presented, petitioners respectfully request that the Court hold this petition pending disposition of *Nitro* and then grant this petition, vacate the judgment of the Supreme Court of Missouri in this case, and remand this case for proceedings consistent with *Nitro*.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 194 S.W.3d 353 and reprinted at Pet. App. 1a. The opinions of the Missouri Court of Appeals (Pet. App. 15a) and the trial court (Pet. App. 33a) are not reported.

JURISDICTION

The Supreme Court of Missouri entered judgment on May 2, 2006, which was modified by its own motion on June 30, 2006. Petitioners filed a timely motion for rehearing that was denied on June 30, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984) ("For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate.").

STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED

This petition raises issues under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000) ("FAA"). The text of FAA §§ 2-4 is set forth in the appendix at pages 37a-38a. This petition also raises related FAA issues as to the American Arbitration Association Commercial Arbitration Rules ("AAA Rules") and the Judicial Arbitration and Mediation Services Comprehensive Arbitration Rules and Procedures ("JAMS Rules").

AAA Rule R-7(a) provides:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the **existence**, **scope** or **validity** of the arbitration agreement.

(Pet. App. 78a (emphasis added).)

JAMS Rule 11(c) provides:

> Jurisdictional and arbitrability disputes, including disputes over the **existence**, **validity**, interpretation or **scope** of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(*Id.* at 79a (emphasis added).)

STATEMENT OF THE CASE

A. Factual Background

As in *Nitro*, the Amway Corporation (Amway) is not a party to this case, but its multi-level marketing business for the sale of consumer goods provides the backdrop.[1] Instead of directly implicating the sale of these Amway products, this case arises from the "tools" and "functions" used by Amway distributors to increase sales of Amway consumer products. Tools are motivational products such as audiotapes, videotapes, and literature. Functions are motivational seminars, rallies, and conventions.

Respondents Netco Inc. (Netco) and Schmitz & Associates, Inc. (Schmitz Associates) are tool and function businesses,

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[1] Amway is now known as Alticor, Inc. and its subsidiary is Quixtar, Inc.

respectively.[2] Both were owned by non-parties Charlie and Kim Schmitz and were part of the "Schmitz Organization." An "'organization' is a term of art for the conglomeration of an Amway distributorship, its owner(s), and their independent tools and functions businesses." (Pet. App. 2a.)

In 1998, petitioner Pro Net Global Association, Inc. (Pro Net) was created to facilitate the sale of tools and organization of functions. The founders of Pro Net included petitioners Hal Gooch and Bill Childers. Petitioner Jimmy Dunn later joined Pro Net. Each of these individuals has an Amway-related organization similar to the Schmitz Organization. Mr. Gooch's organization includes his tool business, petitioner Gooch Support Systems, Inc. (Gooch Support), and his functions business, petitioner Gooch Enterprises, Inc. (Gooch Enterprises). Similarly, Mr. Childers's tool business is petitioner TNT, Inc. of Charlotte, North Carolina (TNT). Petitioner Jimmy V. Dunn & Associates, Inc. (Dunn Associates) is in Mr. Dunn's organization.

B. The Two Arbitration Agreements

This case involves two separate agreements to arbitrate "any" and "all" disputes that were signed by Mr. Schmitz and are known as the Pro Net agreement and the Amway distributorship agreement.

First, the Amway distributorship agreement, which was signed by Mr. Schmitz in the name of Netco, requires adherence to the Amway Rules of Conduct. (Pet. App. 74a-75a.) Under Amway Rule 11.5.5, "[w]hen parties agree to arbitrate under the Arbitration Rules, they thereby authorize Endispute, Inc., d/b/a J.A.M.S./Endispute . . . to administer the Arbitration." (*Id.* at 77a.) As cited *supra* and explained in the *Nitro* petition, the JAMS Rules give the arbitrator the

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[2] The Schmitzes also operated their Amway distributorship through Netco.

responsibility to determine the existence, scope, and validity of an agreement to arbitrate. (*Id.* at 79a.)

Second, Pro Net adopted an arbitration clause specific to its membership. As a result, the Pro Net application, which Mr. Schmitz signed as president of Netco, and the Pro Net Terms and Conditions provide for the use of AAA arbitration procedures. The Pro Net arbitration clause provides, in pertinent part:

> Any dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, controversy, or claim between one or more members of the Association or between the Association and any of its members . . . . shall be submitted to and settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at that time . . . .

(*Id.* at 69a.) As cited *supra* and explained in the *Nitro* petition, the AAA Rules (like the JAMS Rules) give the arbitrator the responsibility to determine the existence, scope, and validity of an agreement to arbitrate.

C. This Litigation

Notwithstanding the two broad arbitration agreements, Netco and Schmitz Associates filed this action in Missouri state court in June 2000. As with the claims in *Nitro*, the claims in this case allege a "conspiracy" to "misappropriate" respondents' tool-and-function businesses. (*Id.* at 3a, 11a.)

Citing the FAA, all petitioners promptly moved to compel arbitration under the two agreements described above. Before the trial court, petitioners submitted a memorandum of law contending that all defenses to arbitrability should be directed to AAA and/or JAMS arbitrators because the agreements incorporated these arbitration rules. (*Id.* at 39a-44a.)

On September 17, 2003, the trial court issued a single letter opinion denying the motions to compel arbitration in both *Netco* and *Nitro*.[3] (*Id.* at 34a-35a.) The court did not deny that respondents' claims were encompassed by one or more of the arbitration clauses, but denied arbitration because of concerns about certain Amway procedures. (*Id.*) The letter opinion did not address the Pro Net agreement. (*Id.*)

Petitioners appealed to the Missouri Court of Appeals. In both their opening and reply briefs, petitioners again argued that incorporation of the AAA and JAMS rules delegated determination of arbitrability to the arbitrators. (*Id.* at 45a-50a; 51a-54a.) The court of appeals filed its opinion on April 15, 2005. (*Id.* at 15a.)

The court of appeals observed that, under the FAA, a court, not an arbitrator, "is the one to resolve issues related to the validity of the contract." (*Id.* at 25a (internal quotation omitted).) The court of appeals held that the trial court erred in failing to compel AAA arbitration of all respondents' claims under the Pro Net agreement. (*Id.* at 32a.) In light of this holding, the opinion did not address arbitration pursuant to the Amway distributorship agreement. (*Id.*)

D. The Opinion of the Supreme Court of Missouri

Respondents appealed to the Supreme Court of Missouri. As in *Nitro*, the primary basis of their transfer petition was the procedural question of whether state law required a jury to hear a motion to compel arbitration. Consistent with other courts, the court's opinion, as modified on June 30, 2006, held that such motions should be resolved without a jury. (*Id.* at 12a-13a.)

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[3] On appeal, the Missouri Court of Appeals and Supreme Court of Missouri each heard oral arguments in both cases on the same day and simultaneously issued their separate (but similar) opinions in both cases.

In their opening and reply briefs, petitioners again argued that the incorporation of AAA and JAMS Rules into the agreements required that arbitrability issues for each agreement be determined by the respective arbitrator. (*Id.* at 55a-61a; 62a-63a.) The Supreme Court of Missouri, however, ruled that a court, not an arbitrator, "must determine whether a valid arbitration agreement exists and, if so, whether the specific dispute falls within the scope of the arbitration agreement." (*Id.* at 4a.) Thus, the court implicitly held that, although the AAA and JAMS rules clearly were incorporated by reference into the respective agreements, this incorporation did not provide the arbitrator with authority to determine the "existence," "scope," and "validity" of the agreement.

The Supreme Court of Missouri then analyzed both of the arbitration agreements at issue. With respect to the Amway distributorship agreement, the court held that Netco, but not Schmitz Associates, was bound to JAMS arbitration under the agreement. (*Id.* at 4a-8a.) Even after so holding, however, the court did not apply JAMS Arbitration Rule 11(c), which provides that "[t]he Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." (*Id.* at 79a.) Instead, the court itself concluded that the arbitration clause did not cover Netco's claims. (*Id.* at 7a-8a.)

With respect to the Pro Net agreement, the court held that that the claims of the Schmitzes' tool business, Netco, must be submitted to AAA arbitration, but not the claims of their function business, Schmitz Associates. (*Id.* at 5a-6a; 8a-9a.) Even after so holding, however, the court did not apply AAA Arbitration Rule R-7(a), which provides that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." (*Id.* at 78a.)

Under Pro Net's arbitration clause, AAA arbitration is required of "[a]ny dispute" involving "one or more members of the [Pro Net] Association." (*Id.* at 69a.) The court con-

cluded summarily—and inconsistently—that only the individual petitioners joined Pro Net and not their tool-and-function counterparts to Netco. (*Id.* at 9a-10a.) Thus, the court held that Netco must arbitrate its claims against Pro Net, Childers, Dunn, and Gooch, but not these tool-and-function entities: Gooch Support, Gooch Enterprises, TNT, and Dunn Associates. (*Id.* at 9a-10a; 13a-14a.) Finally, the court also held that Pro Net's tools supply company, Global Support Services, Inc., could not compel arbitration under the Pro Net agreement. (*Id.* at 10a.)

This petition followed.

REASONS FOR GRANTING THE WRIT

The Court should hold this petition pending disposition of the petition for a writ of certiorari in *Nitro* (filed September 26, 2006), and then grant this petition, vacate the Supreme Court of Missouri's judgment in this case, and remand this case for further proceedings consistent with *Nitro*. This course of action is warranted for at least four reasons.

First, the FAA issue presented in this petition is identical to the issue before the Court in *Nitro*. Both cases call for this Court to determine the effect under the FAA of arbitration rules, incorporated by reference, that provide the arbitrator with sole authority to determine the "existence," "scope," and "validity" of the agreement. The petition for a writ of certiorari in *Nitro* explains why the Court should resolve this important question of federal law.

Second, the Supreme Court of Missouri recognized the substantial overlap between this case and *Nitro* by designating them as "companion case[s]." (Pet. App. 1a.) Additionally, oral argument was heard by the Supreme Court of Missouri on the same day in both cases and the court issued both of its decisions on the same day.

Third, this case and *Nitro* both involve the incorporation by reference of the same arbitration rules into the same types of arbitration agreements. Specifically, both cases involve incorporation of the AAA Rules into the Pro Net agreement and incorporation of the JAMS Rules into an Amway distributorship agreement.[4]

And *fourth*, all of the petitioners in this case, with the sole exception of Dunn Associates, are petitioners in *Nitro*. In *Nitro*, but not in this case, the Supreme Court of Missouri directed the dismissal of Dunn Associates. 194 S.W.3d at 350, 352. Therefore, Dunn Associates is a petitioner only in this case.

CONCLUSION

Because of the substantial overlap between this case and *Nitro*, the Court should hold this petition pending disposition of the *Nitro* petition, and then grant certiorari, vacate the judgment of the Supreme Court of Missouri, and remand the case for further proceedings consistent with *Nitro*.

Respectfully submitted,

LARRY K. BRATVOLD
BRATVOLD LAW FIRM, P.C.
1200 East Woodhurst Drive
Building H, Suite 400
Springfield, MO 65804
(417) 887-5300

GASPARE J. BONO
Counsel of Record
STEPHEN CHIPPENDALE
MINDY L. CAPLAN
MCKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioners

September 27, 2006

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[4] A third agreement to arbitrate—the "Transition-to-Pro Net" agreement—is at issue only in *Nitro*.

APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
en banc

NETCO INC., et al.,
Respondents,

v.

JIMMY V. DUNN, et al.,
Appellants.

No. SC86855

May 2, 2006
As Modified on Denial of Rehearing June 30, 2006

STEPHEN N. LIMBAUGH, JR., *Judge*

Appellants seek reversal of the judgment of the circuit court overruling their motions to compel arbitration and stay litigation. After opinion by the Court of Appeals, Southern District, this Court granted transfer. Mo. Const. art. V, sec. 10. The judgment of the trial court is affirmed in part and reversed in part, and the case is remanded.[1]

I. Facts and Procedural History

This case concerns the business relationships between respondents and appellants arising from their participation in Pro Net Global Association, Inc. (Pro Net), a network of businesses engaged in the sale and distribution of Amway-related business support materials (BSMs). Respondents are Netco, Inc. (Netco) and Schmitz & Associates, Inc. (Schmitz

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[1] A companion case involving most of the same issues, *Nitro Distribution, Inc., et al. v. Jimmy V. Dunn, et al.*, 194 S.W.3d 339 (Mo. banc 2006) (No. SC86854), is also decided this date.

Associates), both owned by Charles and Kim Schmitz, though the Schmitzes, personally, are not parties. The eleven appellants are: Jimmy V. Dunn (Dunn); Jimmy V. Dunn & Associates, Inc. (Dunn Associates); Harold Gooch, Jr. (Gooch); Gooch Support Systems, Inc. (Gooch Systems); Gooch Enterprises, Inc. (Gooch Enterprises); William Childers (Childers); TNT, Inc. (TNT); Jim Evans (Evans); J.L. Evans & Associates, Inc. (Evans Associates); Pro Net; and Global Support Services, Inc. (Global). As best as can be discerned, appellants are all Amway Corporation (Amway) distributors, Amway related businesses, or their respective principals.

Amway is not a party in this case, but the questions raised require a brief explanation of Amway's business practices as they relate to the parties that are involved. Amway is a multilevel marketing corporation consisting of a network of independent distributors structured in a pyramid-like hierarchy. As part of Amway's standard distributorship agreement, there are "Rules of Conduct" that include a mandatory arbitration clause requiring Amway distributors to submit any dispute to arbitration through JAMS/Endispute, Inc., an independent arbitration entity.

As a method of improving sales, Amway produces and distributes motivational products called "tools" and "functions" aimed at training and motivating distributors. "Tools" are audiotapes, videotapes and published materials, and "functions" are seminars, rallies and conventions. Together, the tools and functions are commonly referred to as BSMs. A number of other businesses affiliated with Amway distributors sell their own Amway-related BSMs, though Amway distributors themselves are prohibited from doing so under the Rules of Conduct. As used in the Amway corporate culture, an Amway "organization" is a term of art for the conglomeration of an Amway distributorship, its owner(s), and their independent tools and functions businesses.

Pro Net was formed in 1998 to "facilitate the sale of Amway-related BSMs to its members," apparently as a kind of clearinghouse. Those wishing to join Pro Net were required to submit applications mandating compliance with Pro Net's "Terms and Conditions." This not only required members to abide by Amway's Rules of Conduct, but also required members to submit any dispute to arbitration under a separate arbitration clause in which arbitrations were to be administered by the American Arbitration Association.

The Schmitzes formed plaintiff Netco in 1990 to operate their Amway distributorship and to operate a tools business for the support of the distributorship. In 1998, Charlie Schmitz submitted a Pro Net membership application on behalf of Netco, but Schmitz altered the terms of the application relating to Netco's ability to distribute BSMs from supplier or manufacturers. The result, according to Schmitz, was that Pro Net rejected the application, and for that reason Netco never became a member of Pro Net and cannot be bound by the Pro Net arbitration clause. According to appellants, on the other hand, the application was accepted, or at least Netco is estopped from claiming that it was not accepted and, as a result, Netco is bound by the Pro Net arbitration clause.

The Schmitzes also own Schmitz Associates, which is engaged solely in the functions business. Neither Schmitz, nor any officer or agent of Schmitz Associates signed a Pro Net membership application on behalf of Schmitz Associates.

In 2000, Netco and Schmitz Associates filed lawsuits alleging, *inter alia*, that appellants were involved in a conspiracy to misappropriate respondents' businesses. Appellants—some, but not all, of whom are members of Pro Net—filed a motion to compel arbitration under Pro Net's Terms and Conditions and Amway's Rules of Conduct. After considerable discovery, the parties submitted a voluminous amount of evidence to the motion court consisting of more

than 4,000 pages of documents, affidavits, deposition transcripts and other materials, and after an evidentiary hearing and extended argument on the matter, the court overruled the motion. This appeal followed, as authorized under the Missouri Uniform Arbitration Act (MUAA), sec. 435.440, RSMo 2000.

II. Analysis

When faced with a motion to compel arbitration, the motion court must determine whether a valid arbitration agreement exists and, if so, whether the specific dispute falls within the scope of the arbitration agreement. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 426, 427-28 (Mo. banc 2003). In making these determinations, the court should apply the usual rules of state contract law and canons of contract interpretation. *Id.* at 428. Appellate review is *de novo*. *Id.*

A. Schmitz Associates

Appellants seek to compel Schmitz Associates to arbitrate its claims under both the Amway Rules of Conduct and the Pro Net Terms and Conditions, despite the fact that Schmitz Associates was not a signatory to the Amway distributorship agreement nor the Pro Net membership agreement. Though appellants offer several theories in support—third-party beneficiary, estoppel, agency and an alter ego-like argument—none is persuasive.

To be bound as a third-party beneficiary, the terms of the contract must clearly express an intent to benefit that party or an identifiable class of which the party is a member. *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301 (Mo. banc 1993). In cases where the contract lacks an express declaration of that intent, there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only themselves. *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 141 (Mo. banc

1987). Furthermore, a mere incidental benefit to the third party is insufficient to bind that party. *Id.* at 140.

Here, neither the Amway distributorship agreement nor the Pro Net agreement express any intent to benefit Schmitz Associates, and any benefits actually obtained from the agreement were merely incidental. Although appellants cite Schmitz Associates' acknowledgment that "it relied on and profited from Netco's Amway relationship, a relationship predicated on the Amway Rules of Conduct and Netco's status as an Amway distributor," the mere fact that Schmitz Associates had a mutually beneficial relationship with Netco does not make Schmitz Associates a third-party beneficiary. Schmitz Associates' reliance and profits from that relationship are the kind of insufficient incidental benefits to which the rule refers. Thus, because Schmitz Associates in not a third-party beneficiary to the agreements, it cannot be bound to the arbitration clauses in those agreements.

The equitable estoppel argument, under both the Amway agreement and the Pro Net agreement, is that Schmitz Associates has asserted rights under those agreements in bringing this lawsuit, so it cannot now disavow the obligations that the agreements impose and, in particular, the obligation to arbitrate the claims. However, a close reading of the petition shows that Schmitz Associates is not seeking to enforce any provision in the Amway or Pro Net agreements. Appellants are being sued, instead, under conspiracy theories, not because they breached any contractual term.

Appellants next claim that Schmitz Associates is bound to arbitrate under the Amway distributorship agreement (though not under the Pro Net agreement) as an agent of Charlie and Kim Schmitz. In support, appellants cite *Byrd v. Sprint Commc'ns Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996), for the proposition that "non-signatory agents [are] bound by arbitration agreements signed by their principals." In this Court's view, however, *Byrd* was wrongly decided. Under

hornbook rules of agency, it is the principal that can be bound by the signature of the agent, not the agent that can be bound by the signature of the principal. This is so because the principal can control the conduct of the agent, which is the essence of the agency relationship. *State ex rel. Bunting v. Koehr*, 865 S.W.2d 351, 353 (Mo. banc 1993). It is not the other way around, that the agent can control the principal. Otherwise the principal would be the agent for the agent. Thus, without the benefit of *Byrd*, the agency theory is to no avail, and the rule controls that "[a] party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *Dunn*, 112 S.W.3d at 436. To the extent it is to the contrary, *Byrd* is overruled.

Appellants alter ego-like argument is that Schmitz Associates should be bound under the Pro Net agreement because Schmitz Associates is part of the Schmitz "organization" and the Schmitz organization, rather than Netco alone, was admitted to membership in Pro Net. Again, however, Schmitz Associates was not a signatory to the Pro Net agreement. The Schmitz "organization," on the other hand, cannot bind Schmitz Associates because the "organization" has no legal significance. Apparently, appellants would have this Court disregard Schmitz Associates' status as a separate and independent corporation, but the only way to achieve that result is to pierce the corporate veil. That remedy, however, in the context of the issues presented here, is only available where outside control of the corporation has been used "to commit fraud or wrong, to perpetrate the violation of statutory or other positive legal duty, or [a] dishonest and unjust act . . . ." *66, Inc. v. Crestwood Redev. Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999). Suffice it to say that appellants have neither pled nor proven this element. Absent that proof, Schmitz Associates is not bound to arbitrate under the alter ego theory.

B. Scope of Amway Agreement

Unlike Schmitz Associates, Netco is bound to abide by the Amway Rules of Conduct because it is a signatory to an Amway distributorship agreement. But even assuming that Schmitz Associates is also bound, Netco and Schmitz Associates contend that the scope of the arbitration agreement does not cover the disputes that are the subject of their petition against appellants. This Court agrees.

The Amway arbitration clause states:

> [T]he parties are required to submit any remaining claim(s) arising out of or relating to their Amway Distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct (including any claim against another Amway distributor, or any such distributor's officers, directors, agents, or employees or against Amway Corporation or any of its officers, directors, agents, or employees) to binding arbitration in accordance with the Amway/ADA Arbitration Rules.

This is not a suit against Amway. Nor are Netco and Schmitz Associates' claims brought pursuant to Netco's Amway distributorship. Nor do Netco and Schmitz Associates make any allegation pertaining to the Amway Sales and Marketing Plan. Nor do they allege that appellants violated the Amway Rules of Conduct or any other part of the Amway agreement. And in that regard, the petition expressly states, "This action is not predicated upon the Amway Rules (since the BSMs industry is not a party of the Amway business), nor does it seek the enforcement of any such Rules." Instead, the subject and entire focus of the lawsuit is that appellants allegedly conspired to misappropriate Netco and Schmitz Associates' BSM businesses. According to Amway's own documents, in order to avoid antitrust concerns, BSM businesses are organized in and operate in an industry entirely independent of Amway. And, in fact, Amway promulgated and distributed a

separate BSM arbitration agreement for use by independent BSM businesses, in lieu of the arbitration clause in the Amway Rules of Conduct. Although this Court is mindful of the many cases holding that the scope of arbitration agreements is to be liberally construed, the Amway clause in this case is clear on its face and cannot be stretched to cover the lawsuit herein.

C. Netco and Pro Net

Appellants contend that Netco is bound to arbitrate under the arbitration clause in Pro Net's Terms and Conditions because the Schmitzes signed and submitted a Pro Net application. To the contrary, Netco contends that it never became a member of Pro Net because Pro Net rejected Netco's membership application after Charlie Schmitz, Netco's president, altered the terms of the application. Whether the altered membership application constituted a counter-offer, and whether that counter-offer was then accepted by Pro Net, is problematic both from a factual and legal standpoint. Without deciding these questions, however, this Court holds as a matter of law that Netco was otherwise estopped from denying membership in Pro Net; thus, it is bound to arbitrate under the Pro Net arbitration clause.

From a close review of the record, it is clear that Netco received benefits of Pro Net membership. A party may be estopped from questioning the existence, validity and effect of a contract by accepting the benefits of that contract *Dunn*, 112 S.W.3d at 437. This is because of the equitable principle that a party "should not be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations, or burdens." *Dubail v. Medical West Bldg. Corp.*, 372 S.W.2d 128, 132 (Mo. 1963).

By the Schmitzes' own admission, "Global's records established that Netco continued to order BSMs well into 1999"

and that it ordered more than 54,000 BSMs through Global during that time. Because Netco indisputably purchased BSMs through Global rather than Pro Net, Netco contends that these purchases were not a benefit of Pro Net membership and, further, that anyone could purchase from Global, regardless of Pro Net membership. However, this argument is refuted in Netco's petition, which alleged that Netco's ability to purchase BSMs through Global *was* a benefit of Pro Net membership. In fact, one of Netco's primary claims is that it was pressured to join Pro Net because it would otherwise be prohibited from purchasing BSMs through Global. According to Netco, distributors who "pulled out of Pro Net" were "cut off by Global" and Pro Net's president instructed Global not to supply BSMs to distributors who abandoned Pro Net. Netco also alleges that because of defendants' conspiracy, a distributor "either purchased his BSMs from Defendants or he was done." Simply stated, respondents' suggestion on appeal that anyone could purchase through Global is wholly irreconcilable with the allegations in the petition. By purchasing BSMs through Global and by conceding that those purchases were a benefit from Pro Net membership, Netco is estopped to deny that it is bound by the terms of Pro Net membership.

D. Appellants' Standing to Compel Arbitration

This Court's holding that Netco is bound to arbitrate under the Pro Net arbitration clause is complicated by the fact that not all of the eleven appellants are members of Pro Net so as to have standing to compel arbitration. Indeed, Netco argues, for one reason or another, that none of the eleven appellants are members of Pro Net. However, Pro Net itself can compel arbitration under the express language of the Pro Net Terms and Conditions. In addition, three of the appellants—Gooch, Childers and Dunn—personally signed the Pro Net membership application. Although Netco claims that Gooch and Childers signed only as "founding" members and that only "regular" members can avail themselves of the Pro Net arbi-

tration clause, they did in fact sign the Pro Net membership application, were admitted to membership and, thus, can compel arbitration. Unlike Schmitz, however, these individuals did not sign on behalf of their distributorships, Gooch Systems and Gooch Enterprises, TNT, and Dunn Associates, respectively and, therefore, these parties cannot compel arbitration. The same holds true for non-signatories Global, Evans, and Evans Associates.

Although appellants correctly state that a non-signatory may, in some instances, compel a signatory to arbitrate under the theory that the plaintiff/signatory is estopped from refusing to arbitrate, that is not the case here. The estoppel theory in this context is most often applied in cases where a plaintiff alleges that a defendant is liable under the terms of a contract, even though the defendant was a non-signatory to the contract. These allegations might be made, for instance, in cases where the defendant itself is estopped from denying liability under the contract, or where defendant is a third-party beneficiary, or in cases where the defendant/non-signatory was an agent or alter ego of a signatory.[2] In a case frequently cited on this issue, the Seventh Circuit explained the rule as follows:

> [I]t would be manifestly inequitable to permit [plaintiff] to both claim that [the non-signatory party] is liable to [plaintiff] for its failure to perform the contractual duties described in the agreement and at the same time deny that [the non-signatory] is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause.

Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp., 659 F.2d 836, 838-39 (7th Cir. 1981). *See also Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720

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[2] These are, of course, the same categories of claims that defendants here have pressed against plaintiffs to hold them to the Amway and Pro Net contracts and the respective arbitration clauses.

(8th Cir. 2001). Under this reasoning, the non-signatory in *Hughes* was able to compel arbitration because the very basis of the claim against the non-signatory was that it had breached duties and responsibilities purportedly assigned it by the agreement. This result follows in cases of this kind because the plaintiff "should not be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations, or burdens." *Dubail*, 372 S.W.2d at 132.

The case at hand, however, is altogether different. Plaintiffs are not claiming that these appellants are liable for failing to perform some term of the Pro Net agreement but, instead, are arguing, as noted again, that Pro Net served as co-conspirator to misappropriate their business. Furthermore, to the extent these appellants contend that they should be allowed to compel arbitration under the related theory that the claims against them are "inextricably intertwined with those against Pro Net," that theory is inconsistent with the overarching rule that arbitration is ultimately a matter of agreement between the parties. *See Dunn*, 112 S.W.3d at 436.

E. Jury Trial Issue

Finally, Netco contends that in the event this Court holds that the trial court erred in ruling that Netco was not bound to arbitrate, then the proper disposition is not to order arbitration, but to remand for a jury trial as provided by the Federal Arbitration Act (FAA), and if not a jury trial, then a full evidentiary hearing replete with findings of fact and conclusions of law. Only then, Netco contends, can the disputed factual issues be resolved to determine whether a valid arbitration agreement exists. Appellants, on the other hand, argue that the issues should be determined only in a summary proceeding, as specified in section 435.355(1).

As Netco correctly observes, the FAA unambiguously provides for a jury trial when factual disputes arise in federal courts regarding the making of an arbitration agreement. 9 U.S.C. sec. 4 (2000). However, neither the United States Supreme Court nor this Court has determined whether parties are entitled to a jury trial when identical disputes arise in state courts. While the FAA's substantive law applies in state courts, the procedural provisions of the FAA do not bind state courts unless the state procedures in some way defeat the rights granted by Congress. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). Thus, this Court will look to the procedures set out in the MUAA rather than the FAA. The pertinent MUAA procedure, then, is section 435.355(1), which states:

> On application of a party showing an agreement described in section 435.350, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court *shall proceed summarily* to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

(emphasis added). Although this Court has not expressly addressed the meaning of the term "proceed summarily," and the statute does not provide a special definition, under the legal definition, which this Court now adopts, summary proceedings are those that are conducted "[w]ithout the usual formalities [and] without a jury." BLACK'S LAW DICTIONARY 1476 (8th ed. 1999). *See also Rogers v. Dell Computer Corp.*, 127 P.3d 560 (Okla. 2005); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992) (holding that the "proceed summarily" language in the UAA does not require a jury trial on the existence of an arbitration agreement).

The language of section 435.355(1) notwithstanding, Netco contends that the denial of a jury trial would deprive it of its constitutional right to a trial by jury in civil actions. However,

this argument mischaracterizes the nature of the motion to compel arbitration, which, in essence, is an equitable remedy designed to compel specific performance of a term in a contract. *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1070 (Cal. 1996). In civil actions, of course, the right to trial by jury attaches only to actions at law for which damages may be awarded, not to suits in equity. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003). Though the motion to compel arbitration is ancillary to the underlying action at law, it is a separate proceeding authorized under section 435.355(1) in which equitable relief is sought.

Netco's fallback position that the summary proceeding conducted by the motion court was otherwise inadequate also fails. Where, as here, there were disputed factual issues, it is necessary to conduct an evidentiary hearing. However, given the summary nature of the proceedings, it is not enough for Netco to say that the motion court declined to entertain live witnesses and cross-examination or to provide findings of fact and conclusions of law. As noted, the motion court was provided with more than 4000 pages of documents, affidavits, deposition transcripts and other materials with which to resolve the factual disputes. Having also reviewed this voluminous mass, this Court is quite satisfied that the evidence presented on both sides was more than ample to resolve those disputes in the summary fashion dictated by the statute.

III. Summary and Conclusion

This Court holds:

1. Netco was not entitled to a jury trial to determine whether a valid arbitration agreement exists, and the motion court properly conducted a summary proceeding on that issue.

2. Netco is bound to arbitrate its claims against appellants Gooch, Childers, Dunn, and Pro Net under the arbi-

tration clause set out in the Terms and Conditions of the Pro Net agreement.

3. Netco is not bound to arbitrate its claims against appellants Gooch Systems, Gooch Enterprises, TNT, Global, Dunn Associates, Evans, and Evans Associates, under the Pro Net agreement, nor is Netco bound to arbitrate its claims against any of the appellants under the arbitration clauses in the Amway agreement.

4. Schmitz Associates is not bound to arbitrate its claims under either of the two arbitration agreements.

Because some of the appellants can compel Netco to arbitrate and others cannot and because Schmitz Associates cannot be compelled to arbitrate by any of them, the issue arises whether the trial court should stay the litigation of all the claims pending arbitration. The parties agree that this determination lies within the trial court's discretion and that the case must be remanded for that purpose. *See AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 242 F.3d 777, 783 (8th Cir. 2001); *Fru-Con Constr. Co. v. Southwestern Redev. Corp. II*, 908 S.W.2d 741, 746 (Mo. App. 1995).

The judgment of the trial court is affirmed in part and reversed in part, and the case is remanded.

All concur.

APPENDIX B

MISSOURI COURT OF APPEALS
Southern District
Division Two

[April 15, 2005]

No. 26064

NETCO, INC., et al.,
Respondents,

vs.

JIMMY DUNN, et al.,
Appellants.

APPEAL FROM THE CIRCUIT COURT
OF GREENE COUNTY, MISSOURI

Honorable J. Miles Sweeney, *Judge*

REVERSED AND REMANDED WITH DIRECTIONS.

This cause of action arises out of the business relationship between Appellants[1] and Respondents Netco, Inc. ("Netco")

[1] Appellants are all Amway Corporation ("Amway") distributors, Amway related businesses, or their respective principals. The following parties are Appellants herein: Jimmy Dunn ("Dunn"); Jimmy V. Dunn & Associates, Inc. ("Dunn Associates"); Harold Gooch, Jr. ("Gooch"); Gooch Support Systems, Inc. ("Gooch Systems"); William Childers ("Childers"); TNT, Inc. ("TNT"); Jim Evans ("Evans"); J.L. Evans & Associates, Inc. ("Evans Associates"); Pro Net Global Association, Inc. ("Pro Net"); and, Global Support Services, Inc. ("Global"). Claims against the following parties were dismissed prior to this appeal: Michael P. Abbey ("Abbey"); Abbey Corporation; Gerald Pressley ("Pressley"); and, Pressley Corporation. Additionally, Evans Associates was substituted for original defendant Evans Corporation and Gooch Enterprises, Inc. ("Gooch Enterprises") was added as a defendant and is also a party to this appeal.

and Schmitz & Associates, Inc. ("Schmitz Associates") (collectively "Respondents"), both owned by Charles and Kim Schmitz ("the Schmitzes"). The parties' dispute arises from their participation in a network of business organizations called Pro Net Global Association, Inc. ("Pro Net").

To better understand our analysis of Appellants' points relied on, it is necessary that we recite certain evidentiary matters as revealed by the record.

The record reveals that the parties' relationship is based on their involvement with Amway. Amway, now known as "Alticor" or "Quixtar," is a multi-level marketing business which sells consumer goods through a vast network of independent distributors. These Independent Business Owners ("IBOs") merchandise products directly to consumers, not in fixed retail stores.

The Amway business structure and the distribution of its products is governed by the Amway Rules of Conduct ("Rules of Conduct"), to which each Amway distributor is required to subscribe in its initial "Distributor Application."[2]

With each IBO acting as an independent contractor, Amway employs a pyramid-like structural hierarchy. Every IBO is in charge of building and managing its own sales force by recruiting and sponsoring new distributors, who are then supplied and trained to sell Amway products.

IBOs are compensated by receiving a percentage of the sales from their entire sales pyramid as well as from earnings derived from their own sales to retail customers. The distributorships that occupy positions below a particular IBO in each branch of the Amway network are referred to as that IBO's "downline." As such, an IBO's downline includes

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[2] The Rules of Conduct define and establish certain principles to be followed in the development and maintenance of an Independent Business ("IB") and the rights, duties and responsibilities of each IBO.

those persons the IBO personally sponsors, as well as people whom those below them sponsor. Conversely, those distributorships that occupy positions in the network above a given IBO are referred to as that distributorship's "upline." These positions are determined by the essential Amway concept of the "line of sponsorship." Amway distributors are instructed that respect and observance of the line of sponsorship is mandatory; that they should support and edify their upline distributors; and, that their upline distributors are there to teach and support them.

With that being said, the present matter does not directly involve the purchase or sale of Amway products. Instead, this matter relates to the parallel business of selling Business Support Materials ("BSMs") to Amway distributors.

IBOs use these non-Amway produced BSMs, called "tools" and "functions," as a way to train, guide, and motivate their downline sales force. "Tools" are sponsoring and merchandising aids, such as audio and video tapes, literature and flip charts. Similarly, "functions" are educational seminars, rallies, and other meetings conducted by distributors for others in their line of sponsorship.

The use and distribution of these independently produced BSMs "are entirely optional;" are "strictly voluntary;" and, "must comply" with specific provisions of the Rules of Conduct.

In the present matter, the Schmitzes originally became involved with Amway in 1984. In 1990, they incorporated Netco, and assigned their interest in their Amway distributorship to Netco.[3] The Schmitzes also operated their non-Amway "tools" business through Netco.

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[3] In their "Application for Amway Distributor Authorization (Corporate)," which assigned their Amway distributorship to Netco, the Schmitzes and Netco agreed to "comply with the Amway Sales and Marketing Plan and the Code of Ethics and Rules of Conduct for Amway distributors."

In 1992, the Schmitzes formed Schmitz Associates, a corporation which facilitated their "functions" business.[4] Schmitz Associates "operated in tandem with Netco to build, support and enhance the Amway business."[5]

During the fifteen years that the Schmitzes were involved with Amway, they personally sponsored fifty-three Amway distributors, had a network of over eight thousand downline distributors, and reached the exclusive "diamond" level of leadership within Amway.[6]

In 1998, Pro Net was formed as an organization "to facilitate the sale of Amway-related [BSMs] by its members." Pro Net proposed that Pro Net members would transfer to Pro Net the copyright and intellectual property rights in the BSMs they produced. Pro Net would, in turn, make the members' tapes available for sale and distribution to all other Pro Net members. Pro Net contracted with Appellant Global to fill the orders of its members and distribute the BSMs.

The founding members of Pro Net, most of whom are Appellants herein, were Respondents' upline distributors within the Amway line of sponsorship.[7] As such, the Pro Net founding members invited the Schmitzes to join Pro Net. As a

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[4] Rule 3.14.2 of the Amway Rules of Conduct prohibits an Amway distributorship from engaging in any business other than the sale of Amway products or services. Accordingly, as the tool and function business is not technically part of Amway, it is "customary for the distributor to operate his/her tool and function business through one or more different corporations, separate from the operating entity for the distributor's Amway business."

[5] The record reveals that in their petition, the Schmitzes collectively referred to the above-named entities as the "Schmitz Organization."

[6] In July of 1999, the Schmitzes sold their Amway distributorship as well as their tools and functions businesses to Joanne Schmitz, Charles Schmitz's ("Schmitz") mother.

[7] The founding members of Pro Net were Gooch; Ken Stewart; Steve Woods; Tim Foley; and Childers.

result, the Schmitzes attended a conference given by Pro Net in Myrtle Beach, South Carolina, in May of 1998, at which time they were formally invited to join the organization and were advised of the terms and conditions of membership.

Thereafter, on December 9, 1998, Schmitz, on behalf of Netco, signed a "Pro Net Global Association Membership Application," and submitted the form to Pro Net.[8] Though he paid the twenty-five dollar application fee, Schmitz wrote on the application: "I sign this with the understanding that I am not giving up my right to buy-sell or produce support materials from other suppliers or manufacturers. *As per phone conv [sic] with Paul Brown 12/8/98 /s/ CH."[9]

Attached to the Pro Net Membership Application submitted by Schmitz were the Pro Net Terms and Conditions. The Pro Net Terms and Conditions included the statement that "[m]ember agrees to adhere to the Amway Corporation's Code of Ethics and Rules of Conduct for distributors, the Association's Bylaws" and "[m]ember agrees to refrain from using [BSMs] unless they have been approved by the Association."

In addition, Paragraph 11 of the Pro Net Terms and Conditions contained an alternative dispute resolution provision applicable to all members:

> Any dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, controversy, or claim between one or more members of the

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[8] In the "Member Name" line of the membership application, Schmitz wrote "Netco, Inc. (Charlie & Kim Schmitz)."

[9] As discussed more fully below, while initially reluctant to accept Netco's application containing Schmitz's written reservation, Pro Net ultimately accepted the application and granted Netco full membership benefits.

> Association or between the Association and any of its members which cannot be resolved through negotiation . . . shall be submitted to mediation administered by the Association. Each party to the dispute shall name a mediator who shall be an Association Member at the diamond level or higher of Amway. Upon the selection of two mediators, the two chosen mediators shall select a third mediator who shall be an Association Member at the diamond level or higher of Amway. If agreement is not reached by the parties by mediation, any Dispute shall be submitted to and settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at that time, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction . . . .

According to Gooch, who was a founding member of Pro Net, the above dispute resolution clause was added to the Pro Net Terms and Conditions because "Amway had just incorporated an arbitration provision in its rules and that [Pro Net] wanted to follow the same approach."

On June 27, 2000, Respondents Netco and Schmitz Associates filed suit against Appellants alleging, *inter alia*, that Appellants "primary objectives were to monopolize, control and manipulate the tool and function business, ignore and circumvent the essential 'lines of sponsorship' in the BSMs business, to boycott [Respondents], to impair [Respondents'] networks of downline distributors and to convert [Respondents'] tool and function business to their own pecuniary benefit and advantage . . . ."[10]

Respondents subsequently filed their "First Amended Petition" alleging twelve counts of liability against Appellants:

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[10] The original petition included R.K. Kelm Co., L.L.C. ("Kelm") and "Joanne Schmitz d/b/a Schmitz & Co." as plaintiffs. Both of these parties voluntarily dismissed their claims against Appellants prior to this appeal.

tortious interference; promissory estoppel; fraudulent misrepresentation; negligent misrepresentation; "Breach of Implied-in-Fact Contract Concerning the Tool Business;" "Breach of Duty of Good Faith and Fair Dealing Concerning the Contract Governing the Tool Business;" "Breach of Implied-in-Fact Contract Concerning the Function Business;" "Breach of Duty of Good Faith and Fair Dealing Concerning the Contract Governing the Function Business;" unlawful pyramid scheme; "Antitrust Violation—Conspiracy to Monopolize;" "Antitrust Violation—Group Boycott;" and, "Antitrust Violation—Price Fixing and Allocation of Customers."

As previously related, in response to Respondents' claims, Appellants filed a motion to compel arbitration and stay the proceedings.[11] In a four-line "Order," the trial court denied Appellants' motion to compel arbitration and stay litigation, to-wit:

> NOW, on this 22nd day of January, 2004, it is ORDERED that, after consideration, [Appellants'] Motion to Compel Arbitration and Stay Litigation and [Appellants'] Motion for Rehearing are hereby denied. The Court orders the parties to mediate the case within ninety (90) days unless a timely appeal or writ is filed in regard to this determination.[12]

This appeal followed.

Appellants' three points of trial court error are premised upon the trial court's denial of their motion to stay litigation and compel arbitration. In their first point on appeal,

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[11] The motion to compel arbitration was filed by Appellants Dunn, Dunn Associates, Evans, Evans Associates, Abbey, and Pressly. These Appellants were later joined in the motion by Gooch, Gooch Systems, Childers, TNT, Pro Net, and Global.

[12] This same Order was issued in *Netco, Inc., et al., v. Jimmy Dunn, et al.*, a companion case to the present matter, which involves many of the same Appellants as in this appeal and is similarly on appeal in this Court.

Appellants assert all of the parties in this matter were bound to arbitrate under the Amway arbitration provisions, as set out in the Amway Rules of Conduct, because the subject matter of each of Respondents' claims was within the scope of that provision. Specifically, Appellants maintain that Netco is contractually bound to comply with the Amway arbitration provisions; and that Schmitz Associates is also bound to the Amway arbitration provisions because it is either a "third-party beneficiary of Netco's Amway distributorship," or an agent of Netco, and, as such, it is equitably estopped from denying that it is bound by the Amway arbitration provisions.

In their second point, Appellants contend the trial court erred as a matter of law in concluding the Amway arbitration procedures were unconscionable and in failing to sever the allegedly unconscionable procedures from the Amway Rules of Conduct and the Amway arbitration clause.

In their last point, Appellants maintain the trial court erred in failing to address specifically the separate Pro Net arbitration agreement, "which independently bound all of the parties to arbitrate all issues in this case in an arbitration to be administered by the American Arbitration Association." We have chosen to address Appellants' points on appeal out of order and choose to begin our review with Appellants' third point relied on. It is dispositive of this appeal.

"An appellate court's review of the arbitrability of a dispute is de novo." *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). "Whether a dispute is covered by an arbitration clause is a matter of law." *Azbill v. UMB Scout Brokerage Servs., Inc.*, 129 S.W.3d 480, 483 (Mo.App. 2004). "'[C]ourts favor and encourage arbitration proceedings.'" *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 228 (Mo.App. 2002) (quoting *Metro Demolition and Excavating Co. v. H.B.D. Contracting, Inc.*, 37 S.W.3d 843, 846 (Mo.App. 2001)).

Both the United States Congress and the Missouri General Assembly have enacted arbitration legislation. *See* 9 U.S.C.S. § 1 (2004), *et seq.*; § 435.350.[13] This Court recognizes the existence of a public policy of actively enforcing private arbitration agreements under both the Federal Arbitration Act ("FAA") and the UAA. *Greenwood v. Sherfield*, 895 S.W.2d 169, 173 (Mo.App. 1995). However, when an arbitration agreement involves interstate commerce, the effect of the arbitration clause is governed by the FAA, whether suit is brought in state or federal court.[14] *Byrd v. Sprint Communications Co.*, 931 S.W.2d 810, 813 (Mo.App. 1996).

Under the FAA, "[d]oubts as to arbitrability should be resolved in favor of coverage." *Dunn*, 112 S.W.3d at 429; see 9 U.S.C.S. § 2 (2004).[15] *See Moses H. Cone Mem'l Hosp. v.*

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[13] "Missouri has adopted the Uniform Arbitration Act ("UAA"), fashioned after the federal act, found in §§ 435.350-.470. . . ." *Sheffield Assembly of God Church, Inc. v. Am. Ins. Co.*, 870 S.W.2d 926, 929 (Mo.App. 1994). Section 435.350 provides that:

> [a] written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Unless otherwise specified, all statutory references are to RSMo 2000 and all Rule references are to Missouri Court Rules (2005).

[14] "Because the contracting parties in this case reside in different states, this agreement relates to interstate commerce within the meaning of the FAA." *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 106-107 (Mo.App. 2003); *see* 9 U.S.C.S. § 2 (2004); *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 202 (Mo.App. 1996).

[15] 9 U.S.C.S. § 2 (2004) states:

> A written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable,

Mercury Constr., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765, 785 (1983); *McCarney v. Nearing, Staats, Prelogar and Jones*, 866 S.W.2d 881, 890 (Mo.App. 1993).

"Before a party may be compelled to arbitrate under the FAA, a court must determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the substantive scope of that agreement." *Dunn*, 112 S.W.3d at 427-28; *see Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, 694-95 (8th Cir. 1994). As previously related, "[w]hether a dispute is covered by an arbitration clause is relegated to the courts as a matter of law and is to be determined from the contract entered into by the parties.'" *Estate of Athon v. Conseco Fin. Servicing Corp.*, 88 S.W.3d 26, 30 (Mo.App. 2002) (quoting Greenwood, 895 S.W.2d at 174).

In their third point relied on, Appellants posit the Pro Net arbitration provision was a valid agreement which was completely independent of the Amway provision and required arbitration under the rules of the American Arbitration Association ("AAA"), not under the Amway Rules of Conduct. Appellants argue that Netco is bound by the Pro Net arbitration provision through Netco's membership in Pro Net and Pro Net's acceptance of Netco's application for membership. Further, Appellants premise Schmitz Associates is bound by the Pro Net arbitration clause "because [Schmitz Associates] was an integral part of the 'Schmitz Organization' which was a member of Pro Net." Appellants also assert Schmitz Associates is bound by the Pro Net agreement as a third party beneficiary and/or under the doctrine of equitable estoppel. Accordingly, Appellants maintain that all of the claims in this matter arise under the Pro Net agreement and the Pro Net Terms and Conditions cover the parties' dispute.

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and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

With that being said, "Missouri courts have held that under either the Missouri Arbitration Act or the [FAA] 'before a court may grant a party's motion to compel arbitration, it must decide whether the agreement containing the arbitration provision is valid and legally binding.'" *Estate of Burford ex rel. Bruse v. Edward D. Jones & Co., L.P.*, 83 S.W.3d 589, 592 (Mo.App. 2002) (quoting *Hitcom Corp. v. Flex Fin. Corp.*, 4 S.W.3d 618, 620 (Mo.App. 1999)). "The trial court, not an arbitrator, is the one to resolve" issues related to the validity of the contract. *Silver Dollar City, Inc. v. Kitsmiller Constr. Co., Inc.*, 874 S.W.2d 526, 536 (Mo.App. 1994). The trial court must determine (1) that a valid agreement exists between the parties and (2) that the dispute at issue falls within that agreement. *Dunn*, 112 S.W.3d at 427-28. If the court finds that the contract containing an arbitration agreement is valid and binding on the parties, the moving party is entitled to an order compelling arbitration.[16] *Silver Dollar City*, 874 S.W.2d at 537. "If the trial court finds the contract void or, for some other reason, unenforceable, there is obviously no valid arbitration provision." *Id.* In such determinations, "general state law principles of contracts and agency govern the question of which parties are bound by an arbitration agreement." *Byrd*, 931 S.W.2d at 813. "[G]enerally, applicable state law contract defenses, such as fraud, duress and unconscionability, may be used to invalidate arbitration agreements without contravening the FAA." *Swain*, 128 S.W.3d at 107; *see Doctor's Asssoc., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902, 909 (1996). "As the obligation to arbitrate rests on free assent and agreement, the subsistence and validity of an arbitration

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[16] "The right of appeal is purely statutory." *Albright v. Kelley*, 926 S.W.2d 207, 209 (Mo.App. 1996). Under section 435.440.1(1), "[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration made under section 435.355." We have jurisdiction to review the trial court's Order denying Appellants' motion to compel arbitration and stay the proceedings. *See Dunn*, 112 S.W.3d at 427.

clause are governed by the usual rules and cannons [sic] of contract construction." *Greenwood*, 895 S.W.2d at 174.

As previously set out, Netco disputes Pro Net's assertion that it was a member of that organization. However, the record reveals that on December 9, 1998, Schmitz signed the "Pro Net Global Association Membership Application" as "President" of Netco. In the line of the application denoted for "Member Name," Schmitz typed, "Netco, Inc. (Charlie & Kim Schmitz)." By his signature, Schmitz bound Netco to the Pro Net agreement. *See Gaar v. Gaar's Inc.*, 994 S.W.2d 612, 619 (Mo.App. 1999) (holding that "the president of a corporation may, without any special authority . . . perform all acts of an ordinary nature which by *usage or necessity* are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business.")

Additionally, Schmitz executed Netco check #5333, in the amount of twenty-five dollars, and sent it to Pro Net as the "initiation fee" for joining the organization. This check was subsequently cashed by Pro Net. Schmitz's handwritten reservation, which stated that he wanted to retain his right to "buy-sell or produce support materials from other suppliers or manufacturers," did not in any way seek to alter the terms of the arbitration provisions as set out in the Pro Net Terms and Conditions. While Netco contends Schmitz's application was rejected by Pro Net, we find that Netco's application, inclusive of Schmitz's handwritten reservation, was accepted.[17] This is born out by the fact that Netco was subsequently permitted to engage in all the activities provided to Pro Net members and was allowed the full benefits of membership.[18]

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[17] "The manifestation of acceptance of an offer need not be made by the spoken or written word; it may also come through the offeree's conduct in accord with the terms of the offer." *Medicine Shoppe Int'l, Inc. v. J-Pral Corp.*, 662 S.W.2d 263, 271 (Mo.App. 1983).

[18] In his affidavit relating to Schmitz's attempt to handwrite a reservation of rights onto his Pro Net application, Gooch, one of the founding

The trial court erred in its implicit determination that Netco was not bound under the terms of the Pro Net agreement.

We turn now to the issue of whether Schmitz Associates is bound to arbitrate under the terms of the Pro Net agreement. We recognize that while the federal policy favoring arbitration is strong, it alone cannot authorize a non-party to invoke arbitration or require a non-signatory to arbitrate. *Greenwood*, 895 S.W.2d at 174.

Among Appellants' arguments, they assert that Schmitz Associates was a party to the Pro Net agreement, including its arbitration provision, based on the principles of equitable estoppel.

In *Casarotto*, the Supreme Court of the United States noted that "[b]y enacting [9 U.S.C.S.] § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Cassarotto*, 517 U.S. at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d. 270, 276 (1974)). More recently, in *Dunn*, the Supreme Court of Missouri observed that "[b]y accepting benefits, a party may be estopped from questioning the existence, validity, and effect of a contract." *Dunn*, 112 S.W.3d at 437.

Here, we determine that Schmitz Associates benefited from Netco's agreement with Pro Net. We note preliminarily that

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members of Pro Net, stated

> Upon receiving Schmitz's membership application, Paul Brown was asked to contact [Schmitz] to request that he submit another application because the initial application contained certain additional language added by [Schmitz]. However, it was later determined that Pro Net would accept the application, and Pro Net did accept the application. Pro Net also cashed the application check. . . . The Schmitz Organization was permitted to continue their Pro Net membership, and it did so.

the Schmitzes, as well as the other members of the Pro Net organization, classified Schmitz, Netco and Schmitz Associates as a singular "Schmitz Organization," and paid little deference to the individual nature of the separate entities. In their "First Amended Petition," Respondents themselves pled that "Schmitz Associates facilitated Netco's rally, convention and function business for the Schmitzes, and operated in tandem with Netco to build, support and enhance the Amway business." Indeed, Respondents set out that "[t]he Schmitzes and [Netco and Schmitz Associates] are collectively referred to herein as the 'Schmitz Organization.'"[19]

Not only was Schmitz the principal of both Netco and Schmitz Associates, but the two entities were run as a single unit. Netco and Schmitz Associates were operated out of the same office by the Schmitzes; Schmitz was the principal of both corporations; and, both corporations used the same letterhead and facsimile number. Additionally, Schmitz Associates paid Netco a management fee to perform its business operations. Based on the foregoing, there is no denying that Netco's agreement with Pro Net was set up to benefit the entire Schmitz Organization, including Schmitz Associates.

The Schmitz Organization and Schmitz Associates, which was in charge of the Schmitz Organization's "functions" business, accepted the benefits of Pro Net membership by purchasing BSMs to which they otherwise would not have had access from Global.[20] The record reveals that in 1998 the

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[19] As best we discern from the record, Pro Net intended its members to be neither individuals nor individual entities; instead, Pro Net classified its members as "Organizations" or by the last name of their principals and did not consider the fact that the "Organizations" were made up of individual corporate entities. Such treatment of its members as singular units known by the name of their principals, illustrates the fact that membership in Pro Net was intended to benefit and bind all of an organization's individual entities.

[20] It is important to note that Pro Net had contracted with Global to not only fill the orders of Pro Net members but also to distribute the BSMs.

Schmitz Organization purchased from Global: 187 books, 5,970 tapes, 39,463 items of literature, and 279 videos for a total of 45,899 orders; and, that in 1999 the Schmitz Organization purchased from Global: 8,360 books, 8,714 tapes, 42,593 items of literature, and 2,526 videos for a total of 54,669 orders.

The Schmitz Organization and Schmitz Associates also utilized the Pro Net website; customized the Schmitz Associates/Netco website to include references to Pro Net, including the posting of the "ProNet Global" logo as a banner on the website; listed their own BSMs for sale in the Global catalogue distributed to Pro Net members; ordered two hundred copies of "Profiles" which is a Pro Net magazine; and, the Schmitzes personally attended Pro Net functions.

As previously mentioned, Schmitz Associates "facilitated Netco's rally, convention and function business . . . and operated in tandem with Netco to build, support and enhance the Amway business. . . ." As a general rule, "[a] party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2nd Cir. 1999) (holding that the owners of a ship were estopped from denying the applicability of an arbitration provision in a contract between the shipbuilder and an entity that certified the ship as safe and seaworthy, where the owners received the direct benefits of lower insurance rates and the ability to sail under the French flag); *see also E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3rd Cir. 2001) (holding that "[g]enerally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration

clause in the contract.").[21] Based on the foregoing, Schmitz Associates is estopped from refusing to arbitrate its dispute in accordance with the dispute resolution provision of the Pro Net Agreement.[22]

We reiterate that "[a] dispute must be arbitrated if . . . the dispute falls within the scope of th[e] agreement." *Getz*, 71 S.W.3d at 229; *see Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir. 2001). In the instant matter, the Pro Net arbitration clause required arbitration of:

> [a]ny dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, con-

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[21] Nevertheless, a party must receive a "direct benefit" from a contract containing an arbitration provision, as opposed to an "indirect" benefit. In *Thomson-CSF, S.A., v. Am. Arbitration Assoc.*, 64 F.3d 773, 778 (2nd Cir. 1995), Rediffusion, a company in the business of building flight simulators, entered into a "Working Agreement" containing an arbitration clause with Evans & Sutherland Computer Corporation ("E & S") to purchase computer-generated image equipment exclusively from E & S. In return, E & S agreed to supply its imaging equipment only to Rediffusion. *Id.* at 775. Subsequently, Thomson-CSF ("Thomson") acquired Rediffusion and E & S sought to bind Thomson to the Working Agreement. *Id.* As a result, Thomson sought a declaration that it was not bound under the Working Agreement. *Id.* The Second Circuit determined that "[h]ad Thomson directly benefitted [sic] from the Working Agreement by seeking to purchase equipment from E & S or enforcing the exclusivity provisions of the Agreement, it would be estopped from avoiding arbitration." *Id.* at 779. The appellate court noted, however, that the "benefit which E & S asserts, derives directly from Thomson's purchase of Rediffusion, and not from the Working Agreement itself; Thomson received no benefit at all from the Working Agreement (as opposed to the acquisition). Thus, Thomson [was] not bound by its subsidiary's arbitration agreement . . . ." *Id.* at 779.

[22] Pursuant to our finding that Schmitz Associates is equitably estopped from denying the arbitration clause in the Pro Net agreement, we will not address Appellants' third-party beneficiary theory.

> troversy, or claim between one or more members of the Association or between the Association and any of its members . . .

A general provision for the arbitration of "[a]ny dispute, controversy, or claim," such as that found in the Pro Net clause, "covers every breach, regardless of importance, that is asserted and denied. . . ." *McCarney*, 866 S.W.2d at 889.

Respondents' claims come within the substantive scope of the Pro Net arbitration clause. First, the clause covers all issues arising between "one or more members of the Association or between the Association and any of its members. . . ." Here, seven of the eleven named Appellants are either members of Pro Net or members of "Organizations" with Pro Net membership and, as found above, Netco is a member of Pro Net.[23] Accordingly, the disputes at issue are between "members of the Association" as stated in the arbitration clause. Second, the Pro Net clause covers all issues "arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the [Pro Net] Membership Application . . . ." In this case, all of Respondents' claims relate to the interpretation and the performance of the relationship between Pro Net, Netco, and Schmitz Associates within the parameters of the Pro Net agreement. As a result, these claims fall squarely within the Pro Net arbitration clause.

The trial court erred in failing to compel Netco and Schmitz Associates to arbitrate pursuant to the arbitration provision set out in the Pro Net agreement. Appellants' third point is granted.

In Appellants' original Motion to Compel Arbitration, Appellants set out that "all of the claims asserted in this action

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[23] It appears that of the eleven named Appellants, only Global, Evans, and Evans Associates were not actual members of Pro Net.

by [Respondents] are subject *to one or more binding arbitration agreements*." (Emphasis added). Based on our finding that the parties are bound by the Pro Net arbitration provision, and Appellants' argument that the parties were subject "to one or more" arbitration clauses, this Court need not address Points I and II. Appellants' third point on appeal is dispositive.

The trial court in this matter was required to grant Appellants' motion to compel arbitration under the Pro Net arbitration clause and was also required to stay litigation during this process. The trial court's failure to do so was error. *See Duggan*, 920 S.W.2d at 208. The order of the trial court denying Appellants' motion to compel arbitration and stay litigation is reversed, and the cause is remanded to the trial court for further proceedings and the entry of an order consistent with this opinion.

Robert S. Barney, Judge

SHRUM, J. - CONCURS

BATES, C.J. - CONCURS

APPENDIX C

STATE OF MISSOURI
CIRCUIT COURT, 31ST JUDICIAL CIRCUIT

GREENE COUNTY COURTHOUSE
SPRINGFIELD, MISSOURI 65802
(417) 868-4086

<j._miles_sweeney@osca.state.mo.us>

SEPTEMBER 17, 2003

MR. DAN BOULWARE
MR. TODD EHLERT
SHUGART THOMSON ET AL.
P. O. BOX 6217
3101 FREDERICK AVE.
ST. JOSEPH, MO 64506

MR. JOHN HOLSTEIN
SHUGART THOMSON ET AL.
SUITE 1200,
HAMMONS TOWER
901 ST. LOUIS
SPRINGFIELD, MO 65806

MR. MATHEW W. PLACZEK
MR. WILLIAM FRANCIS
PLACZEK & FRANCIS
1722-J SOUTH GLENSTONE
SPRINGFIELD, MO 65804

MR. GASPARE BONO
MR. DEAN JABLONSKI
MCKENNA LONG ALDRIDGE
1900 K STREET, NW
WASHINGTON, D.C. 20006

MR. LARRY BRATVOLD
P.O. BOX 14080
SPRINGFIELD, MO 65814

MR. JOHN L. WATKINS
MCKENNA LONG &
ALDRIEGE
303 PEACHTREE STREET, N.E.
SUITE 5300
ATLANTA, GA 30308

MR. ROBERT B. HANKINS
1200 EAST WOODHURST
BUILDING N, SUITE 100
SPRINGFIELD, MO 65804

MR. JARED ROBERTSON
MR. BRIAN MALKMUS
BLACKWELL SANDERS
901 ST. LOUIS ST., SUITE 1900
SPRINGFIELD, MO 65806

MR. MIKE CULLY
MS. ANGELA GREEN
901 ST. LOUIS STREET
10TH FLOOR
SPRINGFIELD, MO 65806

MR. WARREN STAFFORD
3315 EAST RIDGEVIEW
SUITE 1000
SPRINGFIELD, MO 65804

IN RE: NETCO, INC. ET AL VS. DUNN, ET AL.
101CC0075

NITRO DISTRIBUTING, INC. ET AL. V. DUNN, ET AL.
101CC4530

Dear Attorneys:

These matters pend in my Court on several Defendant's Motions to Stay Proceedings and Compel Arbitration. I have read the comprehensive briefs of the parties and I have also studied the wonderfully detailed Opinion by Judge Haldane Taylor of the Fourth Judicial Circuit of Florida (he seems to be a judge with a relatively light trial docket or a couple of good law clerks).

I am inclined to say that I agree with many of the conclusions he reaches in his Findings of Fact and Conclusions of Law and I note that the arguments made there are quite similar to those made in my case. I suppose I agree with his analysis on most of the issues with the possible exception of his characterization of a number of the separate organizations as being basically the same because they were owned by the same people.

An issue, however, that keeps coming back to my mind as an old arbitrator myself, is one which Judge Taylor did not address. It has to do with the nature of the arbitration procedure itself. I am not particularly offended by the fact that the Amway arbitrators are trained in Amway procedures and that the Amway arbitration process is confined to this group. What is absolutely offensive is the fact that board members, some of whom are actual parties to this litigation, have veto power over the retention of these arbitrators in their jobs. That, coupled with the fact that Amway is not bound by its own arbitration requirements and the fact that all proceedings are held in secret leads me to believe that the Amway arbitration provision are, both substantively and

procedurally unconscionable. Irrespective of the arguments about who signed which agreements and when they came into effect, I simply could not require anyone to arbitrate any of these issues under a system that is so fundamentally unfair.

For these reasons, I am denying the Motions to Stay Proceedings and Compel Arbitration. As I indicated earlier, it is now my intention to order all the parties to mediate this case and to do so within ninety (90) days. I hasten to add that my conclusions in this regard predated this most recent flurry of activity and my decision to order mediation is based on my perceptions which I conveyed to all of you and not on any suggestions by any of the attorneys regarding the current litigation in St. Joseph.

Since this ruling favors Mr. Boulware, I will ask him to prepare an order for my signature consistent with this letter and to distribute it to other attorneys for their approval as to form.

Very truly yours,

/s/ J. MILES SWEENEY

JMS/ss

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

Case No. 101CC0075

NETCO, INC., et al.,
Plaintiffs,

vs.

JIMMY V. DUNN, et al.,
Defendants.

Case No. 101CC4530

NITRO DISTRIBUTING, INC., et al.,
Plaintiffs,

vs.

JIMMY V. DUNN, et al.,
Defendants.

ORDER

NOW, on this 22nd day of January, 2004, it is ORDERED that, after consideration, Defendants' Motion to Compel Arbitration and Stay Litigation and Defendants' Motion for Rehearing are hereby denied. The Court orders the parties to mediate the case within ninety (90) days unless a timely appeal or writ is filed in regard to this determination.

/s/ J. MILES SWEENEY, Circuit Judge - Division 2

APPENDIX D

The Federal Arbitration Act, 9 U.S.C. §§1-16 (2000)
(Pertinent Provisions)

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement

for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

APPENDIX E

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
DIVISION NO. 2

Case No. 101CC4530

NITRO DISTRIBUTING, INC., et al.,
Plaintiffs,

vs.

JIMMY V. DUNN, et al.,
Defendants.

Case No. 101CC0075

NETCO, INC., et al.,
Plaintiffs,

vs.

JIMMY V. DUNN, et al.,
Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

* * * *

Plaintiffs attempt to avoid their obligation to arbitrate by alleging that the Amway Rules of Conduct ("Amway Rules") and the separate Pro Net Membership Agreement are illegal contracts because they violate the antitrust laws. Significantly, all of these allegations relate to the contracts as a whole, not the arbitration provisions alone. In these circum-

stances, Prima Paint dictates that these issues are for the arbitrator to decide. See Prima Paint, 388 U.S. at 402-04 (holding that where alleged illegality is directed toward the contract as a whole rather than exclusively toward the arbitration clause, the issue must be decided by the arbitrator). Such a result is consistent with the clear and unmistakable intent of the parties. As explained below, the arbitration provisions contained in the Pro Net Membership Agreement and in the Amway Rules all unambiguously reserve questions of contract validity to the arbitrator, not the Court. Under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA") which applies to this case,[2] parties have the right to determine the scope of the arbitration agreement and the courts must respect that right. See AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986).

* * * *

II. Plaintiffs Are Required To Arbitrate Their Claims Under the Amway Rules and Pro Net Membership Agreement

The arbitration provisions set forth in both the Amway Rules and the Pro Net Membership Agreement require Plaintiffs to arbitrate their claims. Plaintiffs do not challenge the validity of these arbitration provisions in their Supplemental Brief. Instead, Plaintiffs solely attack the entirety of the contracts containing the arbitration provisions by alleging antitrust violations.

This Court should reject Plaintiffs' new arguments for two reasons: (1) the Supreme Court's decision in Prima Paint is controlling and establishes that courts are only to consider issues that specifically go to the validity of the arbitration

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[2] Where, as here, the subject matter of a dispute "'involves commerce' . . . application of the Missouri [Arbitration] Act is preempted by the" FAA). Duggan v. Zip Mall Serv., Inc., 920 S.W.2d 200, 203 (Mo. App. 1996).

provision itself, not to the contract as a whole; and (2) the arbitration provisions in both the Amway Rules and the Pro Net Membership Agreement demonstrate that the parties clearly intended for an arbitrator, not the courts, to decide matters relateing to the existence, validity, interpretation, or scope of the contract. In light of such a clear and unambiguous expression of the parties' intent, the matters raised by Plaintiffs are for an arbitrator to decide.

* * * *

B. Plaintiffs' Efforts To Avoid Prima Paint Are Unavailing

* * * *

In Central Missouri Paving Company v. United Mine Workers of America, 749 F. Supp. 973, 977 (ED. Mo. 1990), the plaintiff alleged that an arbitration agreement contained in a collective bargaining agreement was unenforceable because the collective bargaining agreement was void. Id. at 974, 977. There, as here, the plaintiff's argument concerned the validity of the contract as a whole, not the arbitration provision in particular. Citing Prima Paint, the United States District Court for the Eastern District of Missouri rejected the plaintiff's efforts to avoid arbitration: "[t]he Company's contention concerns the validity of the entire contract rather than the arbitration provisions. As a matter of first impression, they are, therefore, issues for the arbitrator's consideration and not for the Court." Id. at 977 (citations omitted) (emphasis added). Similarly, in Three States Truckings, Inc. v. ARCO Leasing Corp., 470 F. Supp. 1075 (ED. Mo. 1979), the plaintiff argued that because the arbitrator found that there was no consideration to support the agreement between the parties, the arbitrator's award was void because the lack of a valid agreement negated the arbitrator's authority to render a decision. Id. at 1076. The district court rejected this argument: "Arco's own form signed by plaintiffs, recited that the

arbitrator hear 'Any controversy or claim arising out of or relating to this contract, or the breach thereof . . . .' That broad arbitration clause grants the arbitrator authority to decide questions concerning the validity of the contract as a whole." Id. at 1076-77 (citing Prima Paint, 388 U.S. at 404) (emphasis added). As explained below, here each of the arbitration agreements provide that the validity of the agreement itself is a matter for the arbitrator. Accordingly, any question regarding the validity of the agreements themselves is for the arbitrator—not this Court—to decide.

C. Plaintiffs Have Agreed That Any Disputes Relating To The Existence Or Validity Of The Contract Will Be Decided By Arbitration

The FAA envisions that parties may agree to arbitrate issues such as contract validity that would otherwise be before the courts. 9 U.S.C. § 2. The Supreme Court has recognized that the issue of whether a dispute is subject to arbitration "is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (quoting AT&T Tech., 475 U.S. at 649 (emphasis added)); see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995). The Eighth Circuit has followed this approach and has recently affirmed that parties may agree that arbitrators, not the courts, may decide issues of arbitrability. See Bailey v. Ameriquest Mortgage Co., 346 F.3d 821 (8th Cir. 2003) (holding that an arbitrator has authority in the first instance to decide statutory claims where such claims are encompassed by the arbitration agreement).

There can be no serious argument that Plaintiffs have "clearly and unmistakably" agreed to arbitrate their current allegations of antitrust violations under the Pro Net Membership Agreement and the Amway Rules. The Pro Net Membership Agreement provides for arbitration to be administered by the AAA. The AAA Rules specifically provide that

issues of contract validity, enforcement, and scope are to be decided by the arbitrator. Indeed, the Pro Net Membership Agreement expressly provides for the application of the AAA Commercial Arbitration Rules ("AAA Rules") in effect at the time of the arbitration. Rule 8 of the AAA Rules states, in relevant part:

> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(Affidavit of Jocelyn Learned, Ex. A at Vol. III, Tab K contained in Defendants' Appendix of Exhibits to Defendants' Motion to Compel Arbitration filed March 21, 2003) (emphasis added). Rule 8 has been held to be a "'clear and unmistakable' delegation of scope-determining authority to an arbitrator." Sleeper Farms v. Agway, Inc., 211 F. Supp. 2d 197, 200 (D. Maine 2002) (citing Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 203 F.R.D. 677, 685 (SD. Fla. 2001) aff'd 312 F.3d 1349 (11th Cir. 2002); see also Lucile Packard Children's Hosp. and Stanford Hosp. Clinics v. U.S. Nursing Corp., 2002 WL 1162390 (N.D. Cal. 2002); Professional Sports Tickets & Tours v. Bridgeview Bank Group, 2001 WL 1090148 (E.D. Pa. 2001). Accordingly, when parties incorporate this Rule into an arbitration agreement, it unambiguously demonstrates the parties' intent to have arbitrators, not the Court, decide matters of arbitrability—including contract validity.

The Amway Rules similarly provide for arbitration administered by JAMS under the JAMS Rules. Both the Amway Rules and the JAMS Rules each contain a rule nearly identical to Rule 8. Like the AAA rule, the Amway Rules provide:

> disputes over the existence, validity, interpretation or scope of the agreement under which arbitration is sought, may be submitted to and ruled on by the Arbitrator, unless the relevant law requires that a court make such determination.

(Affidavit of Ken Stewart, Ex. 2 at Vol. II, Tab K, F-97-98 contained in Plaintiffs' Suggestions in Opposition to Defendants' Motion to Arbitration filed March 20, 2003) (emphasis added). Rule 11 of the JAMS Comprehensive Arbitration Rules & Procedures states:

> (c) Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator, has the authority to determine jurisdiction and arbitrability as a preliminary matter.

(*See* Rule 11, JAMS Comprehensive Arbitration Rules & Procedures (emphasis added).) Plaintiffs, therefore, have explicitly agreed that any dispute related to the validity of these agreements is for an arbitrator—not this Court—to decide.

* * * *

VI. Conclusion

For the foregoing reasons stated herein, Plaintiffs are bound to arbitrate their claims under the Amway Rules which incorporate the JAMS Arbitration Rules, and under the Pro Net Membership Agreement which incorporates the AAA Arbitration Rules. In their Supplemental Brief, Plaintiffs have presented nothing to overcome the strong presumption in favor of arbitration. Accordingly, Defendant's Motion to Compel Arbitration should be granted and Plaintiffs should be required to arbitrate the issues in this case.

APPENDIX F

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

NO. SD26064

NETCO, INC., ET AL.,
Plaintiffs-Respondents,
vs.
JIMMY V. DUNN, ET AL.,
Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE
GREEN COUNTY CIRCUIT COURT
CASE NO. 101CC4530

BRIEF FOR APPELLANTS

ORAL ARGUMENT REQUESTED

Larry Bratvold
(MO Bar # 27238)
BRATVOLD LAW FIRM, P.C.
1200 East Woodhurst Drive
Building H, Suite 400
Springfield, MO 65814-0800
(417) 887-5300
Robert B. Hankins
(MO Bar # 28021)
1200 East Woodhurst Drive
Building N, Suite 100
Springfield, MO 65814-0800
(417) 881-0332

Gaspare J. Bono
Ray M. Aragon
McKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Appellants

* * * *

3. The Defenses To Arbitrability Raised By Plaintiffs Should Be Addressed By An Arbitrator

While much was made in the court below about allegedly unconscionable terms, the court erred not only in the way those questions were resolved, but in resolving them at all. Likewise, Plaintiffs' arguments below that the contract containing the Amway arbitration clause was illusory, lacked good faith and was unenforceable for lack of mutual consent are addressed to the contract as a whole and thus should also be addressed to the arbitrator. As discussed above, the arbitrator is solely responsible for resolving issues concerning the validity of a contract that contains an arbitration clause, because such issues go to the merits of the parties' dispute. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967) (arbitrator must resolve claim for fraud in the inducement of a contract containing arbitration clause); *Coleman v. Prudential Bache Sec. Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("[c]laims alleging unconscionability, coercion, or confusion in signing the agreement" go the formation of the entire contract and are for the arbitrator); *Hall v. Prudential-Bache Sec., Inc.*, 662 F. Supp. 468, 471 & n.1 (C. D. Cal. 1987) ("[c]laims concerning duress, unconscionability, coercion, or confusion in signing should be determined by an arbitrator because those issues go to the formation of the contract"); *St. Paul Fire and Marine Ins. Co. v. Courtney Enter., Inc.*, 270 F.3d 621, 624-25 (8th Cir. 2001) (claim of fraud in the inducement of contract with arbitration clause "goes to the merits" and is for the arbitrator); *Houlihan*, 31 F.3d at 696 n.5 (defense of failure of consideration "applies to the contract as a whole" and is for the arbitrator); *Creson v. Quickprint of Am., Inc.*, 558 F. Supp. 984, 987-88 (W.D. Mo. 1983) (duress is "of the same remedial character" as fraud in the inducement, and therefore should be decided by the arbitrator).

The public policy favoring arbitration also requires that Plaintiffs' attacks on the Amway arbitration procedures and to the contract as a whole be addressed by the arbitrator rather than the Court. *See Hawkins*, 338 F.3d at 806-07 (all questions unrelated to existence or scope of arbitration agreement, including unconscionability claims, are for the arbitrator); *Bob Schultz Motors*, 334 F.3d at 726 (when parties have contracted to arbitrate, claims beyond those pertaining to the existence of the contract should be addressed to the arbitrator).

As a guiding principle, "a court compelling arbitration should decide only such issues as are essential to defining the nature of the forum in which a dispute will be decided," and other procedural matters and challenges to the contract containing the arbitration clause shall be addressed by the arbitrator, or in a challenge to an arbitral award. *Larry's United Super*, 253 F.3d at 1085-86 (quotations omitted). Accordingly, "[o]nce a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration." *Id.* (*quoting Peacock*, 110 F.3d at 230).

Furthermore, the arbitration provisions in the Amway Rules of Conduct further support that Plaintiffs' alleged defenses to arbitrability are appropriately directed to the arbitrator. The Amway Rules of Conduct state that "[j]urisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, may be submitted to and ruled on by the Arbitrator." (A1269-70; *see also* A1340.) Additionally, the Amway Rules of Conduct provide for JAMS/ Endispute arbitration (Al270; A1340), and JAMS/Endispute also has Comprehensive Arbitration Rules and Procedures. Rule 11(c) of the JAMS rules provides that "[j]urisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbi-

tration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." JAMS Comprehensive Arbitration Rules, Rule 11(c), *available at* http://www.jamsadv.com/rules/comprehensive.asp.

In sum, although Plaintiffs seek to evade arbitration by any means, including making multiple attacks on the procedures under which the arbitration would proceed and challenges to the validity of the contract containing the arbitration claim rather than the arbitration clause itself, none of these arguments address the limited inquiry to be addressed by this Court.[14] Because the Plaintiffs are bound by the arbitration agreement in the Amway Rules of Conduct, and this arbitration agreement encompasses the business disputes between the parties, this Court should reverse the decision of the trial court, and order the parties to arbitration.

* * * *

4. The Defenses To Arbitrability Raised By Plaintiffs Should Be Addressed By An Arbitrator

As with the arbitration agreement in the Amway Rules of Conduct, Plaintiffs raise an extraordinary laundry list of complaints regarding arbitration under the Pro Net Terms and Conditions. Significantly, however, plaintiffs below did not raise any challenges to the Pro Net arbitration agreement on the grounds of unconscionability which was the sole basis on which the trial court had denied the motion to compel arbitration. Nor could Plaintiffs have made such an argument since the Pro Net arbitration was to be administered by the American Arbitration Association under its Commercial Arbitration Rules. As the existence of the Pro Net binding

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[14] Indeed, to the extent Plaintiffs have proved anything through this protracted litigation, it is why businesses seek to limit the difficulty and expense of resolving business disputes by contracting for arbitration in the first place.

arbitration agreement has been established, other issues which Plaintiffs wish to raise concerning the scope of the agreement, and any other challenges to the Pro Net contract containing the arbitration clause, should be addressed to the arbitrator. *See Bob Schultz Motors*, 334 F.3d at 726 ("[i]f the parties have agreed to arbitration, the [Federal Arbitration] Act requires that a district court order them to proceed to that forum, where they must address all other claims to the arbitrator").

For example, Plaintiffs below raised a variety of defenses to the Pro Net contract containing the arbitration clause, including alleged waiver, economic duress, and membership ineligibility. Under *Prima Paint* and its progeny, as discussed earlier in this brief, these alleged challenges to the contract as a whole are to be submitted to the arbitrator. *See, e.g., Howsam*, 537 U.S. at 84 (not only is alleged "waiver, delay, or a like defense to arbitrability" to be presented to the arbitrator, but also "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate" are for the arbitrator to decide).

The Pro Net Arbitration Agreement provides that disputes "shall be submitted to and settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at that time." (A2141.) Rule 7(a) of the same Rules—incorporated into the Pro Net arbitration clause through Rule 1(a)—provides that the arbitrator will decide issues concerning the existence, scope or validity of the arbitration agreement:

> [t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

AAA Commercial Arbitration Rule 7(a), *available at* http://www.adr.org.

Given that issues concerning the scope of the arbitration shall be addressed to the arbitrator under the AAA Rules, this Court should follow the guidance of numerous other courts that have determined that an arbitrator must resolve any questions as to the scope of an arbitration agreement. *See, e.g., Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 200 (D. Me. 2002) (Former AAA Rule 8 , now AAA Rule 7(a), is "a 'clear and unmistakable' delegation of scope-determining authority to an arbitrator") (citation omitted); *Lucile Packard Children's Hosp. v. U.S. Nursing Corp.*, No. 02-0192 MMC, 2002 WL 1162390, at *3 (N.D. Cal. May 29, 2002) (under arbitration agreement governed by AAA rules, questions of arbitrability are to be determined by the arbitrator).

* * * *

APPENDIX G

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

NO. SD26064

NETCO, INC., ET AL.,
Plaintiffs-Respondents,

vs.

JIMMY V. DUNN, ET AL.,
Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE
GREENE COUNTY CIRCUIT COURT
CASE NO. 101CC0075

REPLY BRIEF FOR APPELLANTS

ORAL ARGUMENT REQUESTED

Larry Bratvold
(MO Bar # 27238)
BRATVOLD LAW FIRM, P.C.
1200 East Woodhurst Drive
Building H, Suite 400
Springfield, MO 65814-0800
(417) 887-5300
Robert B. Hankins
(MO Bar # 28021)
1200 E. Woodhurst Drive
Building N, Suite 100
Springfield, MO 65814-0800
(417) 861-0332

Gaspare J. Bono
Ray M. Aragon
McKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Appellants

C. Respondents' Defenses To Arbitrability Should Be Addressed By The Arbitrator

* * * *

2. The *Prima Paint* Doctrine Provides that the Arbitrator Should Resolve Respondents' Challenges to the Contracts

* * * *

Indeed, notwithstanding Respondent's view, parties to a contract are free to agree to arbitrate any and all disputes. *E.g., First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995) (arbitrability turns upon what the parties agreed); *Howsam*, 537 U.S. at 83 (same).

Thus, the question of arbitrability presents a question of contract law for the Court. *E.g., Washington-Baltimore Newspaper Guild v. Wash. Post*, 959 F.2d 288, 291-92 (D.C. Cir. 1992). However, a court should not conduct a minitrial to determine abitrability. *See, e.g., John Wiley & Sons, Inc v. Livingston*, 376 U.S. 543, 557 (1964). Rather, "a brief examination of the arbitration clause to ensure that the party seeking arbitration presents a colorable claim as to its scope is all that is necessary." *Fehribach v. Ernst & Young, LLP*, No. 1:02-CV-01270-JDT, 2003 WL 1906136, at *5 (S.D. Ind. Jan. 6, 2003). In other words, a court should determine whether a "*prima facie* agreement to arbitrate exist[s]" between the parties, *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989), and its review "should not extend beyond ascertaining whether the party seeking arbitration has made a claim which on its face is governed by the contract." *Creson*, 558 F. Supp. at 986.

Therefore, a core question—avoided by Respondents—is whether an arbitration clause makes a clear delegation of arbitrability questions to the arbitrator. *E.g., Howsam*, 537 U.S. at 583. Here, two written, explicit contracts with

arbitration agreements clearly make this delegation to the arbitrator.

The first arbitration agreement, part of the Amway Rules, requires Amway distributors with Amway-related claims to submit claims "arising out of or relating to their Amway Distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct (including any claim against another Amway distributor" to binding arbitration. (A1268; *see also* A1338-39.)

Similarly, Respondents, as members of Pro Net, agreed that disputes between members of Pro Net or between Pro Net and its members be arbitrated under AAA Rules. (A1104.)

The incorporation in both contracts of specific arbitration rules is a clear expression of the parties' intent to have the arbitrator decide issues of arbitrability.[4] For example, the Amway Rules state that "[j]urisdictional and arbitrability disputes, *including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought*, may be submitted to and ruled on by the Arbitrator." (A1269-70 (emphasis added).) Likewise, under the JAMS Rules incorporated into the Amway Rules, "[j]urisdictional and arbitration disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, . . . shall be submitted to and ruled on by the Arbitrator." JAMS Comprehensive Arbitration Rules, Rule 11(c), *available at* http://www.jamsadr.com/rules/comprehensive. asp.

Similarly, the Pro Net Terms incorporate Rule 7 (former Rule 8) of the AAA Commercial Arbitration Rules, which provides that the arbitrator "shall have the power to determine

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[4] Matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in full. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n.5 (Mo. 2003) (en banc).

the existence or validity of a contract of which an arbitration clause forms a part," as well as "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Commercial Arbitration Rules, Rule 7(a), (b), *available at* http://www.adr.org.

By agreeing to these rules, the parties clearly and unmistakably agreed to submit questions of arbitrability to the arbitrator. *See, e.g., Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 202 (D. Maine 2002) (incorporation of AAA rules provides scope-determining authority to an arbitrator); *Prof'l Sports Tickets & Tours, Inc. v. Bridgeview Bank Group*, No. Civ. A. 01-991, 2001 WL 1090148, at *5 (ED. Pa, Sept. 13, 2001) (under AAA rules, the arbitrator determines whether the parties have an agreement for arbitration that encompasses their dispute).

In sum, the Court should conduct a limited inquiry to determine whether there is a *prima facie* contract with an arbitration clause. *Cf. Estate of Burford v. Edward D. Jones & Co., L.P.*, 83 S.W.3d 589, 592-93 (Mo. Ct. App. 2002) (court makes "initial determination" of a binding contract before ordering arbitration). Then, in accordance with the clear expression of intent embodied in the Amway Rules and the Pro Net Terms, the Court should submit this matter to arbitration.

* * * *

APPENDIX H

IN THE SUPREME COURT OF MISSOURI

NO. SC86855

NETCO, INC., ET AL.,
Respondents,
vs.
JIMMY V. DUNN, ET AL.,
Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE

APPELLANTS' SUBSTITUTE OPENING BRIEF
ORAL ARGUMENT REQUESTED

Larry K. Bratvold
(MO Bar No. 27238)
BRATVOLD LAW FIRM, P.C.
Woodhurst Office Park
1200 East Woodhurst Drive
Building H, Suite 400
Springfield, MO 65814
(417) 887-5300

Robert B. Hankins
(MO Bar No. 28021)
1200 East Woodhurst Drive
Building N, Suite 100
Springfield, MO 65814
(417) 866-7777

Gaspare J. Bono
McKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Appellants

* * * *

C. The Amway Rules of Conduct require arbitration of Respondents' dispute with Appellants

On review, this Court should reverse the decision of the Circuit Court below and order arbitration under both the Amway Rules of Conduct and the Pro Net Terms and Conditions.

* * * *

Proper narrow and limited review of the arbitration agreements contained in the Amway Rules of Conduct and in the Pro Net Terms and Conditions, furthers the "public policy of actively enforcing private arbitration agreements under both the Federal and Missouri arbitration acts so that disputes might be resolved without resort to the courts." *Greenwood v. Sherfield*, 895 S.W.2d 169, 173 (Mo. App. S.D. 1995). Indeed, in reviewing both arbitration agreements, "there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (quotation omitted). Respondents, as the parties seeking to avoid arbitration, bear the burden of proof to make such a showing. *State ex rel. PaineWebber v. Voorhees*, 891 S.W.2d 126, 128 (Mo. banc 1995). They cannot do so here.

Under the standards set forth above, the Court should conclude that both the Amway Rules of Conduct and the Pro Net Terms and Conditions contain valid arbitration clauses, and that Respondents' claims are within the scope of both agreements. Accordingly, the Court should reverse with instructions that the Circuit Court "must send the case for arbitration, without reaching any issue concerning the merits of the underlying grievance." *Local 781 v. City of Independence*, 996 S.W.2d 112, 115 (Mo. App. W.D. 1999).

* * * *

4. The defenses to arbitrability raised by Respondents should be addressed by an arbitrator

While much was made in the court below about allegedly unconscionable terms, the court erred not only in the way those questions were resolved, but in resolving them at all. Likewise, Respondents' arguments below that the contract containing the Amway arbitration clause was illusory, lacked good faith and was unenforceable for lack of mutual consent are addressed to the contract as a whole and thus should also be addressed to the arbitrator. As discussed above, the arbitrator is solely responsible for resolving issues concerning the validity of a contract that contains an arbitration clause, because such issues go to the merits of the parties' dispute. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967) (arbitrator must resolve claim for fraud in the inducement of a contract containing arbitration clause); *Coleman v. Prudential Bache Secs. Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("[c]laims alleging unconscionability, coercion, or confusion in signing the agreement" go the formation of the entire contract and are for the arbitrator); *Hall v. Prudential-Bache Secs., Inc.*, 662 F. Supp. 468, 471 & n.1 (C.D. Cal. 1987) ("[C]laims concerning duress, unconscionability, coercion, or confusion in signing should be determined by an arbitrator because those issues go to the formation of the contract."); *St. Paul Fire and Marine Ins. Co. v. Courtney Enter., Inc.*, 270 F.3d 621, 624-25 (8th Cir. 2001) (claim of fraud in the inducement of contract with arbitration clause "goes to the merits" and is for the arbitrator); *Houlihan*, 31 F.3d at 696 n.5 (defense of failure of consideration "applies to the contract as a whole" and is for the arbitrator); *Creson v. Quickprint of Am., Inc.*, 558 F. Supp. 984, 987-88 (W.D. Mo. 1983) (duress is "of the same remedial character" as fraud in the inducement, and therefore should be decided by the arbitrator).

The public policy favoring arbitration also requires that Respondents' attacks on the Amway arbitration procedures and to the contract as a whole be addressed by the arbitrator rather than the Court. *See Hawkins*, 338 F.3d at 806-07; *Bob Schultz Motors*, 334 F.3d at 726. "Once a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration." *Larry's United Super*, 253 F.3d at 1085-86 (quoting Peacock, 110 F.3d at 230).

Furthermore, the arbitration provisions in the Amway Rules of Conduct further support that Respondents' alleged defenses to arbitrability are appropriately directed to the arbitrator. The Amway Rules of Conduct state that "[j]urisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, may be submitted to and ruled on by the Arbitrator." (A1269-70; *see also* A1340.) Additionally, the Amway Rules of Conduct provide for JAMS/Endispute arbitration (A1270; A1340), and JAMS/Endispute also has Comprehensive Arbitration Rules and Procedures. Rule 11(c) of the JAMS rules provides that "[j]urisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." JAMS Comprehensive Arbitration Rules, Rule 11(c), *available at* http://www.jamsadv.com/rules/comprehensive.asp.

In sum, although Respondents seek to evade arbitration by any means, including making multiple attacks on the procedures under which the arbitration would proceed and challenges to the validity of the Amway Rules rather than the arbitration clause itself, none of these arguments address the

limited inquiry to be made by this Court.[18] Because the Respondents are bound by the arbitration agreement in the Amway Rules of Conduct, and this arbitration agreement encompasses the business disputes between the parties, this Court should reverse the decision of the trial court, and order the parties to arbitration.

* * * *

4. The defenses to arbitrability raised by Respondents should be addressed by an arbitrator

As with the arbitration agreement in the Amway Rules of Conduct, Respondents raise an extraordinary laundry list of complaints regarding arbitration under the Pro Net Terms and Conditions. Significantly, however, the Circuit Court below did not raise any unconscionability challenges—the sole basis on which the trial court had denied the motion to compel arbitration.—as to the Pro Net agreement. Nor could any such argument have been substantiated, since the Pro Net arbitration was to be administered by the American Arbitration Association under its Commercial Arbitration Rules. As the existence of the Pro Net binding arbitration agreement has been established, other issues which Respondents wish to raise concerning the scope of the agreement, and any other challenges to the Pro Net contract containing the arbitration clause, must be addressed to the arbitrator. *See Bob Schultz Motors*, 334 F.3d at 726 ("[I]f the parties have agreed to arbitration, the [Federal Arbitration] Act requires that a district court order them to proceed to that forum, where they must address all other claims to the arbitrator.").

For example, Respondents below raised a variety of defenses to the Pro Net contract containing the arbitration

[18] Indeed, to the extent Respondents have proved anything through this protracted litigation, it is precisely why businesses seek to limit the difficulty and expense of resolving business disputes by contracting for arbitration.

clause, including alleged waiver, economic duress, and membership ineligibility. Under *Prima Paint* and its progeny, as discussed earlier in this brief, these alleged challenges to the contract as a whole are to be submitted to the arbitrator. *See, e.g., Howsam*, 537 U.S. at 84 ("waiver, delay, or a like defense to arbitrability" to be presented to the arbitrator, as well as "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate").

The Pro Net Arbitration Agreement provides that disputes "shall be submitted to and settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at that time." (A2141.) Rule 7(a) of the same Rules—incorporated into the Pro Net arbitration clause through Rule 1(a)—provides that the arbitrator will decide issues concerning the existence, scope or validity of the arbitration agreement:

> [t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

AAA Commercial Arbitration Rule 7(a), available at http://www.adr.org.

Given that issues concerning the scope of the arbitration shall be addressed to the arbitrator under the AAA Rules, this Court should follow the guidance of numerous other courts that have determined that an arbitrator must resolve any questions as to the scope of an arbitration agreement. *See, e.g., Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 200 (D. Me. 2002) (Former AAA Rule 8, now AAA Rule 7(a), is "a 'clear and unmistakable' delegation of scope-determining authority to an arbitrator") (citation omitted); *Lucile Packard Children's Hosp. v. U.S. Nursing Corp.*, No. 02-0192 MMC, 2002 WL 1162390, at *3 (N.D. Cal. May 29, 2002) (under

arbitration agreement governed by AAA rules, questions of arbitrability are to be determined by the arbitrator).

* * * *

APPENDIX I

IN THE SUPREME COURT OF MISSOURI

NO. SC86855

NETCO, INC., ET AL.,
Respondents,
v.
JIMMY V. DUNN, ET AL.,
Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE

APPELLANTS' SUBSTITUTE REPLY BRIEF

Larry K. Bratvold
(MO Bar No. 27238)
BRATVOLD LAW FIRM, P.C.
Woodhurst Office Park
1200 East Woodhurst Drive
Building H, Suite 400
Springfield, MO 65804
(417) 887-5300

Robert B. Hankins
(MO Bar No. 28021)
1200 East Woodhurst Drive
Building N, Suite 100
Springfield, MO 65814
(417) 881-0332

Gaspare J. Bono
McKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Attorneys for Appellants

* * * *

IV. Respondents' Defenses Are for an Arbitrator

Finally, Respondents are simply wrong that their entire barrage of attacks on the Pro Net agreement and Amway Rules should be resolved by a court. "Where a contract affecting interstate commerce contains an arbitration provision and does not provide otherwise, the FAA requires the question of the contract's validity ***as a whole*** to be submitted to arbitration." *Rogers*, 2005 Okla. LEXIS 49, at *10 (emphasis added) (citations omitted).

* * * *

64a

PRO NET GLOBAL ASSOCIATION
MEMBERSHIP APPLICATION INFORMATION

The undersigned applicant agrees to abide by all Terms and Conditions of Association Membership:

MEMBER NAME: Netco, Inc. (Charlie & Kim Schmitz)

MEMBER ADDRESS: 5709 NE Woodbine Road

City St. Joseph, MO

State Missouri Zip 64505

MEMBER'S TAX IDENTIFICATION NUMBER OR SOCIAL SECURITY NUMBER: 43-1551599

MEMBER'S ADA NUMBER: 1001476

TELEPHONE NUMBER: (816) 364-2545

FAX NUMBER: (816) 364-5432

AMVOX NUMBER: (913) 495-0792

MEMBER'S E-MAIL ADDRESS: netco@ccp.com

RECEIVED
DEC 11 1998

CONTACT PERSON: Darien Courtney

Title: Manager

Telephone Number: (816) 364-2545

Fax Number: (816) 364-5432

E-mail Address: netco@ccp.com

SIGNATURE: C E Schmitz

Name of person signing: Charlie E. Schmitz

Title: President

DATE: December 9, 1998

I sign this with the understanding that I am not giving up my right to buy-sell or produce support materials from other suppliers or manufacturers.

* As per phone conv with Paul Brown 12/8/98

PLEASE RETURN TO: Pro Net Global Association
6851 Distribution Ave., South
Jacksonville, Florida 32256

Please remit payment of the $25 initiation fee to Pro Net Global Association with the submission of this Membership Application. Annual dues are $20.

PRO NET GLOBAL ASSOCIATION
MEMBERSHIP APPLICATION
TERMS AND CONDITIONS

Upon acceptance of this Membership Application by the Pro Net Global Association ("Association"), a Delaware Association, the applicant ("Member') agrees and accepts the following terms and conditions of Membership incorporated in the Membership Application:

Membership, Obligations, and Benefits

1. This is an application for non-voting membership to the Association and does not constitute an offer of membership. This Membership Application will not be deemed accepted unless and until accepted by the Association in writing. You will be contacted by the Association upon the acceptance or rejection of this Membership Application. This Membership Application and its terms and conditions shall be governed by and construed in accordance with the laws of the State of Delaware, without reference to principles of conflicts of law.

2. Membership in the Association may be terminated for cause consistent with the Bylaws of the Association and also may be terminated if Member becomes ineligible for membership or is in default in the payment of dues.

3. Member agrees to adhere to the Amway Corporation's Code of Ethics and Rules of Conduct for distributors, the Association's Bylaws, and the decisions of the Board of Directors and officers of the Association.

4. Member grants authority to the Association to negotiate for the purchase of business support materials on behalf of the Member.

5. Member agrees to refrain from using business support materials unless they have been approved by the Association.

6. Member agrees to serve on committees of the Association as requested by the Association.

7. The Association will act to provide benefits to members by, among other things:

   a. Providing periodic information helpful in developing the members' Amway businesses.

   b. Acting on behalf of its members to negotiate certain purchase agreements.

   c. Making business support materials, services, marketing materials and other print or electronic literature available for purchase by members.

   d. Providing a forum for the sharing of ideas and suggestions for the improvement and continued growth of its members' Amway businesses.

   e. Promoting, arranging and sponsoring member meetings.

Copyrights

8. As it relates to any Amway Distributor Opens, Business Building Seminars and/or Conventions ("Event"), the Member:

   a. Represents that the undersigned Member is the owner of all right, title, and interest (as author, works for hire or by assignment) in and to all speeches, presentations and all related materials and audio or videotapes thereof ("Works") that the Member or any principal, employee or independent contractor of the Member has previously used or produced in connection with any past Event; that all such Works used or produced (or to be used or produced) at any past or future Event are (or will be) the independent creation of those individuals or of the Member, and that no other persons or entities participated (or will

participate) in the development of such Works, except to any extent that the Member has obtained or obtains any and all necessary transfers of rights and licenses to use such materials in connection with any Event and subsequent duplication thereof.

b. Agrees that with respect to all previously created Works presented and/or audio or videotapes thereof used or produced by the Member or any principal, employee or independent contractor of the Member at any past Event, the Member hereby assigns to the Association all of its worldwide right, title and interest in and to such past Works and any works in any medium derived from them, including but not limited to worldwide copyrights, including renewals and registrations therein, and other proprietary rights therein.

c. Agrees that all Works to be created in the future by the Member, or any of its principals, employees or independent contractors, including but not limited to presentations and related audio or videotapes and materials that the undersigned Member uses or produces in connection with them, shall constitute works made for hire, in which authorship and ownership rights vest in the Association; and further agrees, that to any extent, in whole or part, such future Works subject to this Agreement are determined by a court or other body interpreting or enforcing this Agreement not to constitute a work made for hire, this Agreement shall be read to effectuate the intent here-of to transfer all intellectual property rights in such future Works to the Association; and therefore, with respect to any future Works not deemed to be works for hire, the undersigned Member hereby assigns to the Association all of its worldwide right, title and interest in and to such

future Works and any works in any medium derived from them, including but not limited to the world-wide copyrights, including renewals and registrations therein, and other proprietary rights therein.

d. Agrees that the Association has permission to use the name, image, likeness, voice, photograph and/or biographical information of an individual Member and any principals and employees of a Member for the purposes of advertising or promoting any Event or any broadcast or transmission of such persons' appearances at any past or future Event, or the printed material or any audio or video tapes capturing, recording, or depicting such persons' appearance at any past or future Event; and represents that the undersigned Member is authorized by such persons to provide this permission on their behalf.

f. Agrees to execute, or cause to be executed by its principals and/or employees, in the future any necessary approvals, agreements, assignments, releases, or other documents to effectuate the intent as set forth in paragraphs (a) through (d) hereof.

9. Upon reasonable notice to the Association in writing, Member is authorized to give speeches or presentations, use related materials, and/or to authorize the audio or videotape duplication and distribution of them by others, and to retain proceeds from such event or duplication, at Amway events hosted by a non-member of the Association. The Member shall in such case make reasonable efforts to assure that any audio or videotape duplicates reflect any Association copyrights in an underlying speech or presentation.

10. Upon termination of Member's membership in the Association, upon written request to the Association and reasonable notice, the Association agrees to assign to the

then-former Member all worldwide right, title and interest in and to Works authored by the Member or created as a work for hire on behalf of the Association which are subject to Paragraph 8 hereof, including but not limited to the worldwide copyrights, including renewals and registrations therein, and other proprietary rights therein, in consideration for acknowledgement in writing of the Association's right, royalty free, to sell off all audio and videotapes and related materials featuring such Works in the Association's inventory, or in production under authorization of the Association, as of the date of the request.

Dispute Resolution

11. Any dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, controversy, or claim between one or more members of the Association or between the Association and any of its members which cannot be resolved through negotiation (each, a "Dispute") shall be submitted to mediation administered by the Association. Each party to the dispute shall name a mediator who shall be an Association Member at the diamond level or higher of Amway. Upon the selection of two mediators, the two chosen mediators shall select a third mediator who shall be an Association Member at the diamond level or higher of Amway. If agreement is not reached by the parties by mediation, any Dispute shall be submitted to and settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at that time, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Should any such arbitration relate to intellectual property issues, the arbitrator(s) shall be attorneys specializing in intellectual property law.

VENDOR ID: PRONET CHECK NO: 00005333 DATE: 12/10/98
PAYEE: Pro Net Global Association MEMO:

ACCOUNT	AMOUNT
6100 Dues & Subscriptions	25.00

RECEIVED
DEC 11 1998

CHECK TOTAL: ********$25.00

NETCO, INC.
5709 N.E. WOODBINE ROAD
ST. JOSEPH, MO 64505

MERCANTILE BANK
OF ST. JOSEPH
ST. JOSEPH, MO 64501

5333

00005333

PAY TWENTY-FIVE AND XX / 100 Dollars

DATE 12/10/98 AMOUNT ********$25.00

TO THE ORDER OF
Pro Net Global Association
6851 Distribution Avenue South
Jacksonville, FL 32256

Charles E. Schmidt

⑈005333⑈ ⑆103200039⑆5800114844⑈

Deposit 12/14/98 to First Union
Acct # 4001386389

PRO NET GLOBAL ASSOCIATION MEMBERSHIP APPLICATION

This Membership Application must be completed by all applicants (individuals, corporations, and other entities) for regular membership in Pro Net Global Association (the "Association"). The purpose of the Association is to promote the common business interests of its members engaged in distributing Amway products or services.

Member Benefits

Upon acceptance of this Membership Application, the Association will act to provide benefits for the undersigned applicant ("Member") by:

- Providing periodic information helpful in developing the members' Amway businesses.
- Acting on behalf of its members to negotiate certain purchase agreements.
- Making business support materials, services, marketing materials and other print or electronic literature available for purchase by members.
- Providing a forum for the sharing of ideas and suggestions for the improvement and continued growth of its members' Amway businesses.
- Promoting, arranging and sponsoring member meetings.

Member Obligations

Upon acceptance of this Membership Application by the Association, the Member agrees:

- To adhere to the Amway Corporation's Code of Ethics and Rules of Conduct for distributors, the Association's Bylaws, and the decisions of the Board of Directors and officers of the Association.

- To grant authority to the Association to negotiate for the purchase of business support materials on behalf of the Member.
- To refrain from using business support materials unless they have been approved by the Association.
- To serve on committees of the Association as requested by the Association.
- To be bound by the Terms and Conditions of this Membership Application as set forth on the attachment to this Application.

Copyrights

One of the Association goals is to benefit the undersigned Member and the Association membership generally by the collection and use of the materials of its members as a foundation for development of business support materials for the purchase, distribution and sale by all members. In order to accomplish this, by joining the Association, Member acknowledges that, pursuant to the Terms and Conditions incorporated in this Membership Application, Member is transferring and conveying all copyrights and other intellectual property rights in speeches, presentations, and related materials, and audio and videotapes of them, that have been previously given by the Member at past Amway events, and that are to be given at future Amway events. In addition to this protection, a Member will be permitted by the Association to give speeches and presentations at Amway events hosted by a non-Member of the Association and to duplicate and distribute audio and videotapes of them. Also, if a Member leaves the Association, upon request, the copyrights and other intellectual property rights will be returned to the Member by the Association.

Dispute Resolution

The Association recognizes that conflicts and disputes can occur in any association relationship. The Association is in-

tended to further the interests of its members and to address disputes fairly. Thus, the Association has put into place procedures to avoid litigation, and to encourage resolution of disputes among Amway distributors in the most private and cost-effective manner. Accordingly, by joining the Association, Member acknowledges that, pursuant to the Terms and Conditions incorporated in this Membership Application, Member is agreeing to participate and abide by Association dispute resolution procedures consisting of Association mediation procedures, and use of American Arbitration Association arbitration procedures if the dispute is not resolved through internal Association mediation.

1. IF APPLICANT IS A CORPORATION, COMPLETE ALL SPONSORSHIP INFORMATION REQUESTED. 2. DETACH THIS FIRST COPY OF THE FORM AND PLACE IT IN THE ENVELOPE PROVIDED WITH THIS FORM. MAIL IMMEDIATELY TO AMWAY CORPORATION. SEND NO MONEY. 3. DO NOT WRITE ANYTHING OR CHANGE INFORMATION ON THIS FORM. 4. SEND THE BLUE AND PINK COPIES TO YOUR DIRECT DISTRIBUTOR. 5. SPONSOR KEEPS THE GREEN COPY. 6. APPLICANT RETAINS THE YELLOW COPY.

APPLICATION FOR AMWAY DISTRIBUTOR AUTHORIZATION

ALL AMWAY DISTRIBUTORS IN THE U.S. MUST APPLY FOR AND RECEIVE AMWAY DISTRIBUTOR AUTHORIZATION YEARLY. YOUR AMWAY DISTRIBUTOR AUTHORIZATION, WHICH CARRIES WITH IT THE RIGHT TO RECEIVE MONTHLY COPIES OF THE AMAGRAM, EXPIRES ON DECEMBER 31 OF EACH YEAR. CONSEQUENTLY, YOU MUST INDICATE ON OR BEFORE DECEMBER 31 OF EACH YEAR YOUR INTENT TO CONTINUE TO OPERATE YOUR AMWAY DISTRIBUTORSHIP AND TO SUBSCRIBE FOR THE FOLLOWING YEAR'S AMAGRAM/LITERATURE UPDATE. NOTICE OF INTENT TO CONTINUE YOUR DISTRIBUTORSHIP RECEIVED AND PROCESSED AFTER SEPTEMBER 1 AUTOMATICALLY INCLUDES AUTHORIZATION FOR THE NEXT CALENDAR YEAR. AMWAY DISTRIBUTORS WHO ALLOW THEIR AUTHORIZATIONS TO LAPSE MAY LOSE THEIR RIGHTS TO SERVICE CUSTOMERS AND/OR SPONSOR DISTRIBUTORS. ONLY INDIVIDUALS SHOULD APPLY FOR AUTHORIZATION ON THIS FORM. DISTRIBUTORS WHO WISH TO CONDUCT THEIR DISTRIBUTORSHIP BUSINESS THROUGH A CORPORATION MUST CONTACT AMWAY'S LEGAL DIVISION FOR APPROPRIATE FORMS.

LAST NAME: Lehmitz FIRST NAME(S): Charles DATE 4/15 19 84

ADDRESS RR#1 Box 31 CITY Parnell STATE MO ZIP CODE 64475

TELEPHONE NO. (816) 934-2481 SOCIAL SECURITY NO.(S): 491-62-2594

Have you or your spouse ever been an Amway Distributor before? Yes ____ No V

If so, provide date of last activity: Month ____ Year ____ Previous A.D.A. No. ____

SPONSORSHIP INFORMATION

APPLICANT'S DIRECT DISTRIBUTOR'S NAME: Jerry Byron APPLICANT'S DIRECT DISTRIBUTOR'S NUMBER: 0991

Complete this information if you are presently a distributor outside the U.S. or Canada, or if your International Sponsor resides outside the U.S. or Canada.

INTERNATIONAL SPONSOR'S NAME ____ CITY ____ COUNTRY ____ A.D.A. NO. ____

APPLICANT'S SPONSOR'S NAME: Kenneth + Barbara New

ADDRESS: Box 103

CITY: Raven Wood

STATE: Mo ZIP CODE 64479

* APPLICANT'S SPONSOR'S A.D.A. NUMBER: 1956733 IMPORTANT

*OR SPONSOR'S APPLICATION DATE: 4/15 19 84

LINE OF SPONSORSHIP. PRINT NAME OF IMMEDIATE SPONSOR FIRST, THEN ALL OTHERS UP TO AND INCLUDING FIRST U.S. DIRECT DISTRIBUTOR.

1. Bob & Lonia Wake
2. Dale + Sandy Whites
3. Dennys Janet Johnes
4. Leeds Cory Byron
5. ____
6. ____
7. ____
8. ____
9. ____
10. ____

*NOTE: SPONSOR — YOUR AUTHORIZATION NUMBER APPEARS ON YOUR AMWAY DISTRIBUTOR AUTHORIZATION CARD. IF YOU ARE A NEW DISTRIBUTOR AND HAVE NOT RECEIVED YOUR CARD AS OF YET, PLEASE INDICATE THE DATE YOU SENT IN YOUR APPLICATION. THIS DATE CAN BE FOUND ON YOUR FILE COPY OF YOUR SA-88 FORM.

NOTE: I CERTIFY THAT I HAVE READ THE STATEMENT OF AGREEMENT ON THE BACK OF THIS FORM BEFORE SIGNING THE APPLICATION AND AGREE TO ABIDE BY ITS PROVISIONS.

Charles E. Lehmitz
Applicant's Signature
Applicant Must Be 19 Years of Age or Older

If Husband and Wife Distributorship — Both Must Sign

Parent or Guardian Sign Here If Distributor is a Minor

NOTE: Amway does not encourage the formation of partnerships (other than husband and wife) because of the legal complications to each member of the partnership. For further information on Amway's position on partnerships, see Amway Legal Bulletin No. 4.

THESE QUESTIONS ARE TO BE ANSWERED BY THE PRINCIPAL APPLICANT ONLY. ANSWERS TO BE USED FOR STATISTICAL PURPOSES. ENTER THE MOST APPROPRIATE NUMBER IN THE BOX NEXT TO EACH QUESTION.

1. SEX: 1) MALE 2) FEMALE — [1]
2. MARITAL STATUS: 1) SINGLE 2) MARRIED 3) WIDOW(ER) — [1]
3. IF MARRIED, DOES YOUR SPOUSE CURRENTLY EXPECT TO BE ACTIVE IN AMWAY? 1) Yes, Full Time 2) Yes, Part Time 3) Maybe Later 4) Unlikely 5) No — [4]
4. EDUCATION LEVEL OF HEAD OF HOUSEHOLD: 1) Grade School 2) Some High School 3) High School Graduate 4) Some College 5) College Graduate 6) Post College 7) Vocational Training — [2]
5. HAVE YOU OR YOUR SPOUSE EVER OWNED A BUSINESS? 1) YES 2) NO — [1]
6. TYPE OF RESIDENCE: 1) Own Home 2) Rent Home 3) Own Apartment 4) Rent Apartment 5) Own Mobile Home 6) Rent Mobile Home 7) Other — [7]
7. YOU LIVE IN: 1) Rural 2) City of 1,000,000 or More 3) City of 250,000 to 1,000,000 4) City of 50,000 to 250,000 5) Town of Under 50,000 — [1]
8. AGE: 1) UNDER 18 2) 18-34 3) 35-49 4) 50-64 5) 65 OR OVER APPLICANT'S BIRTHDAY ____ — [2]
9. NUMBER OF CHILDREN UNDER THE AGE OF 21 WHO ARE LIVING AT HOME: — [ ]
10. OCCUPATION OF HEAD OF HOUSEHOLD: 1) Prof., Tech., Mgr. 2) Clerical 3) Service 4) Farm, Fish and Forest 5) Processing 6) Machinery Trade 7) Sales 8) Building 9) Retired — [7]
11. HOW MUCH DO YOU EXPECT TO EARN FROM YOUR AMWAY DISTRIBUTORSHIP IN THE FIRST YEAR? $ 1,200 — [50]
12. IF MARRIED, WHICH PARTNER WAS MOST INFLUENTIAL IN STARTING THE BUSINESS? 1) HUSBAND 2) WIFE — [1]
13. HAVE YOU PREVIOUSLY WORKED IN THE DIRECT SALES FIELD? 1) YES 2) NO — [2]
14. NAME AND DATE OF BIRTHDAY OF ANY MINOR(S) ON APPLICATION ____ — [ ]

IF YOU HAVE NOT REACHED THE AGE OF MAJORITY IN YOUR STATE, A PARENT OR GUARDIAN MUST ALSO SIGN.

74a

BEST AVAILABLE COPY

TO: AMWAY CORPORATION

I hereby apply for an Amway Distributor Authorization. I understand that I must maintain a current authorization in order to retain as an Amway Distributor the right to service my customers and sponsor my distributors. I certify that my line of sponsorship as an Amway Distributor, as listed on the reverse side, is correct and that, if this is not my first application for authorization, my line of sponsorship is the same as under any previous authorization. If not the same line of sponsorship, my previous authorization expired at least six months ago, and I have neither bought nor sold Amway products within that period except as a retail customer. I understand this authorization does not make me an employee, agent, or legal representative of Amway Corporation, my Amway sponsor, or my Direct Distributor. I possess an official Amway Sales Kit.

I will be operating my own business, buying and selling Amway products on my own account. I understand that I have complete freedom in determining the number of hours which I will devote to my business, and that I will have the discretion of scheduling such hours. I understand that Amway will not provide me with a place of business, but if I desire a place of business other than my own residence, I will be responsible for procuring, furnishing, and paying the rental for such place of business. I further understand that I will not be treated as an employee for purposes of the Federal Insurance Contributions Act, the Social Security Act, the Federal Unemployment Tax Act, or the Internal Revenue Code. I understand that I will be responsible with respect to the payment of any self-employment and federal income taxes. I further understand that IRS Form 1099-NEC may be issued to me by my sponsor, my Direct Distributor, or Amway showing the amount of bonuses paid to me during the calendar year. I understand that it will be my responsibility to account for such bonuses on my own personal income tax returns.

I agree to comply with the Amway Sales and Marketing Plan as set forth in official Amway literature and to observe the spirit as well as the letter of the Amway Code of Ethics and Rules of Conduct. I agree, when presenting the Amway Sales and Marketing Plan, to present it in its entirety as outlined in official Amway literature, emphasizing that there is only one Amway Plan for all distributors and that retail selling is an Amway requirement. I further agree to observe the 10-customer rule, to utilize and disseminate only official Amway literature, and to make no claims beyond those shown on product labels and/or official literature. I further promise that I will not sell any Nutrilite® food supplement products until I have read the "Starting Right with Nutrilite" brochure, and I agree to make no representations about such products which are not sanctioned in official Amway literature. I also agree to sell Amway products only in the United States and the authorized offshore Caribbean islands. I understand that my distributorship may be terminated if I fail to comply with the above conditions.

APPENDIX L

The Rules of Conduct

Arbitration Rules

11.5.1. Applicable Rules of Arbitration.

The parties shall be deemed to have made these Rules a part of their Arbitration agreement whenever they have provided for Arbitration under the Corporation's Arbitration Rules ("Rules"). If a party establishes that an adverse material inconsistency exists between an Arbitration agreement and these Rules, the Arbitrator shall apply these Rules; provided, however, that nothing in these Rules shall be construed in any way that limits the Corporation's pre-existing rights to administer, modify or enforce the Independent Business Ownership Plan, the Rules of Conduct or any other Rule or contract relating to an Independent Business.

The Rules in effect on the date of the commencement of an Arbitration will apply to that Arbitration. These Rules shall be amended only by mutual agreement between the Corporation and the IBOAI Board.

11.5.4. Interpretation of Rules and Jurisdictional Challenges

Once appointed, the Arbitrator will resolve disputes about the interpretation and applicability of these Rules, including disputes relating to the duties of the Arbitrator and the conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator is final.

Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, may be submitted to and ruled on by the Arbitrator, unless the relevant law requires that a court make such determinations. The Arbitrator has the authority to determine jurisdiction and arbitrability prior to conducting a full hearing on the merits.

Disputes arising before the appointment of the Arbitrator will be resolved by the Case Administrator, but only those disputes relating to jurisdiction and the location and conduct of the Hearing are subject to subsequent review by the Arbitrator. All other procedures shall be interpreted and applied by the Case Administrator.

The Arbitrator upon good cause shown, or at his/her own discretion only when necessary to facilitate the Arbitration, may extend any deadlines stated in these rules, except the time for rendering the Award.

11.5.5. Administrator of the Arbitration

When parties agree to arbitrate under the Arbitration Rules, they thereby authorize Endispute, Inc., d/b/a J.A.M.S/ Endispute, or its successor (hereinafter "Administrator") to administer the Arbitration. The authority and duties of the Administrator are prescribed in these Rules, and may be carried out through such of the Administrator's representatives as it may direct.

APPENDIX M

AAA Commercial Arbitration Rules

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

APPENDIX N

JAMS Comprehensive Arbitration Rules and Procedures

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Whenever in these Rules a matter is to be determined by "JAMS" (such as in Rules 6, 11(d), 15(d), (f) or (g), 24(i) or 31(e)), such determination shall be made in accordance with JAMS administrative procedures.

(c) Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(d) Disputes concerning the appointment of the Arbitrator and the venue of the Arbitration, if that determination is relevant to the selection of the Arbitrator, shall be resolved by JAMS.

(e) The Arbitrator may upon a showing of good cause or sua sponte, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rules 22(i) or 24.

2

No. 06-451

FILED
OCT 30 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JIMMY V. DUNN, *et al.*,

Petitioners,

v.

NETCO, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

RESPONDENTS' BRIEF IN OPPOSITION

R. DAN BOULWARE
Counsel of Record
R. TODD EHLERT
SHARON KENNEDY
SHUGHART THOMSON & KILROY, P.C.
3101 Frederick Avenue
St. Joseph, Missouri 64506-0217
Telephone: (816) 364-2117

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a non-signatory "clearly and unmistakably" agree to let an arbitrator, rather than the court, determine the existence, scope and validity of a purported arbitration agreement even though that person never signed a writing containing an arbitration clause and thus never expressly agreed to any arbitration rules incorporated therein by reference, including an "arbitrator may decide arbitrability" clause?

The identical question is before the Court in a petition for a writ of certiorari in the companion case of *Dunn v. Nitro Distributing, Inc.*, Case No. 06-446.

CORPORATE DISCLOSURE STATEMENT

Respondents Netco, Inc., and Schmitz & Associates, Inc., have no parent companies and no subsidiaries. No publicly held company owns 10 percent or more of either Respondent.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
RESPONDENTS' BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	2
I. The Amway Arbitration Agreement	4
II. The Pro Net Arbitration Agreement	8
REASONS FOR DENYING THE WRIT	9
I. This Case Is Not Certworthy Because It Does Not Present The Issue Asserted In Petitioners' Question Presented	9
A. The Result Below Would Be The Same Even If An Arbitrability Clause Were Expressly Stated In The Purported Arbitration Agreement	10
II. Petitioners Have Not Shown A True Conflict	14
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Apollo Computer v. Berg, 886 F.2d 469 (1st Cir. 1989) 13, 14

AT&T Tech., Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 11

Contec Corp. v. Remote Solution Co., 398 F.3d 205 (2d Cir. 2005) 13, 14

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 10, 11

Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc., 701 N.W.2d 430 (S.D. 2005) 13, 14, 15

FSC Sec. Corp. v. Freel, 14 F.3d 1310 (8th Cir. 1994) ... 13, 14

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) 11

James & Jackson, LLC v. Willie Gary, LLC, 906 A.2d 76 (Del. 2006) 13, 14

Microchip Technology, Inc. v. Phillips Corp., 367 F.3d 1350 (Fed. Cir. 2004) 13

Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327 (11th Cir. 2005) 13, 14

OTHER

Stevens, J., *Some Thoughts on Judicial Restraint*, 66 Judicature 177 (1982) 15

RESPONDENTS' BRIEF IN OPPOSITION

The Petition should be denied. The issue raised in petitioner's Question Presented was never addressed by the Missouri Supreme Court or by any lower court. Thus, this case presents no direct conflict and no live issue for the Court's consideration. Nor have petitioners managed to show any significant conflict among other courts on the issue they raise.

The Question Presented, as framed by petitioners, is whether parties have "clearly and unmistakably" agreed to have the issue of arbitrability decided by an arbitrator, rather than a court, when an "arbitrator may decide arbitrability" clause is merely incorporated by reference in, rather than expressly set forth on the face of, an arbitration agreement. But none of the courts below expressed an opinion on that issue one way or the other. Nor did they even need to reach that question here. In fact, even if the arbitrability clause had been plainly stated on the face of the purported arbitration agreement, the result here would be no different. The Missouri Supreme Court could not reach the question of whether the parties agreed to arbitrate arbitrability unless and until it first determined the substantive "gateway" issue of whether the non-signatories agreed to the arbitration provision itself. If, as here, the non-signatories[1] never agreed to arbitrate in the first instance, they obviously never agreed to any arbitration rules incorporated by

[1] The Missouri Supreme Court did find that one of the plaintiffs here agreed to arbitrate under one of the arbitration agreements at issue. But, in that instance, it found an agreement by estoppel, not because the plaintiff was a signatory.

reference, such as a rule authorizing an arbitrator to decide arbitrability.

Even if the Missouri Supreme Court had addressed petitioners' Question Presented, it is premature to declare that there is a true conflict among the courts on this issue. Petitioners cite to only one case – a South Dakota state court decision – that expressly held that incorporation of an arbitrability clause by reference is insufficient to constitute clear and unmistakable evidence of an agreement to arbitrate arbitrability. South Dakota stands alone against the First, Second, Eighth and Eleventh Circuits, and the Delaware Supreme Court, all of which have held to the contrary. A single aberrant decision from a state court does not create the type of intolerable conflict that justifies this Court's intervention.

For these reasons, petitioners have not demonstrated compelling reasons for granting certiorari, and their Petition should be denied.

STATEMENT OF THE CASE

Petitioners' rather simplistic Statement of the Case belies this dispute's complexities. This arbitrability dispute arose from a lawsuit filed by plaintiffs-respondents Netco, Inc. ("Netco"), and Schmitz & Associates, Inc. ("Schmitz Associates"), against eleven individuals and corporations, nine of whom are petitioners here. (Pet. at ii). Netco and Schmitz Associates are, or at least until the events giving rise to their suit were, engaged in the sale of Amway-related "BSMs" (business support materials). BSMs are motivational products (*e.g.*, audiotapes, videotapes and literature, also known as "tools") and services

(seminars, rallies, and conventions, referred to as "functions") used to motivate and train Amway distributors. In their lawsuit, plaintiffs Netco and Schmitz Associates alleged, in essence, that the petitioners, all of whom are competitors of plaintiffs in the Amway-related BSMs business, conspired to deprive Netco and Schmitz Associates of their businesses.

At issue in this case are two purported arbitration agreements: (1) the Amway Arbitration Agreement, and (2) the Pro Net Arbitration Agreement. As explained in more detail below, it was undisputed that Schmitz Associates was not a signatory to either agreement. Applying ordinary state contract law principles, the Missouri Supreme Court held that Schmitz Associates was not bound to arbitrate under any of the assorted legal theories advanced by petitioners, such as third-party beneficiary, estoppel, agency and an alter ego-like theory. Given its finding that Schmitz Associates never agreed to arbitrate in the first place, the Missouri Supreme Court had no occasion to reach the question of what that non-existent agreement may have provided, including whether Schmitz Associates agreed to let an arbitrator decide arbitrability, or whether it did so clearly and unmistakably. Nor was this non-issue reached by either of the lower courts.

With respect to the Pro Net Arbitration Agreement, the Missouri Supreme Court found that Netco was estopped to deny arbitration. Having found an agreement to arbitrate by estoppel, it compelled Netco to arbitrate its claims with the signatory petitioners. Because Netco was, in fact, compelled to arbitrate with the signatory petitioners, petitioners' Question is to this extent moot.

With respect to the Amway Arbitration Agreement, the Missouri Supreme Court found that Netco was a signatory to the Amway "distributorship agreement," but did not compel Netco to arbitrate because BSMs disputes are not within the scope of the Amway Arbitration Provision. Netco signed its distributorship agreement in 1991 – seven years *before* Amway ever adopted an arbitration provision. Thus, even though Netco was a signatory to the "*distributorship* agreement," it was not an actual signatory to any express "*arbitration* agreement." Under these facts, even if it could be said that the Court should have reached the arbitrability question, no court could possibly find that Netco clearly and unmistakably agreed to arbitrate arbitrability, when an arbitration provision did not even exist when Netco signed its Amway distributorship agreement. And, because Netco was, in any event, compelled to arbitrate under the Pro Net agreement, whether it may also be bound to arbitrate under the Amway agreement is purely academic.

I. The Amway Arbitration Agreement

Plaintiff Netco is a corporation owned by non-parties Charlie and Kim Schmitz. The Schmitzes operated both their Amway distributorship business and their "tools" business under Netco. In this action, however, they only seek damages relating Netco's BSMs business.

In their quest in the courts below to show that Netco agreed to arbitrate under the Amway Arbitration Agreement, petitioners relied on three separate writings dating

from 1984 to 1991.[2] Only one of those documents, however, was signed by Netco – a 1991 application to become an Amway distributor. The other two were signed by Charlie Schmitz, individually. In fact, the only writing upon which petitioners now rely in support of their petition for a writ of certiorari is the 1984 application of Charlie Schmitz, *individually*, to become an Amway distributor as a sole proprietor. (Pet. App. at 74a-75a). In 1990, the Schmitzes incorporated Netco and began operating their Amway distributorship as a corporation.

When Netco signed its application to become a corporate Amway distributorship in 1991, it agreed to abide by Amway's Rules of Conduct then in effect. In 1991, those Rules did not include an arbitration provision. Unbeknownst to Netco and many other distributors, Amway *unilaterally* amended its Rules of Conduct in 1998 to require mandatory arbitration of certain disputes. Those arbitration rules provided for arbitration before JAMS/ Endispute, Inc. (*id.* at 77a), and also included a rule stating that "disputes over the existence, validity, interpretation or scope of the agreement . . . *may* be submitted to and ruled on by the Arbitrator, *unless the relevant law requires that a court make such determination.*" (*Id.* at 76a (emphasis added)). Netco's distributorship was

[2] Aside from these writings, Petitioners also argued in the courts below that plaintiffs were bound to arbitrate (1) under an implied contract theory based on Netco's renewal of its Amway distributorship, and (2) that plaintiffs agreed to arbitrate under Amway's Rules of Conduct when they became Pro Net members. Neither theory was addressed by the Missouri Supreme Court.

automatically renewed[3] once after the 1998 adoption of arbitration, and a few months later in 1999, Netco sold its Amway business. Netco never signed any writing agreeing to Amway's rules as amended.

Netco denied making an arbitration agreement on a number of grounds, among them that it had no notice of the adoption of any arbitration provision and therefore there was no meeting of the minds, and that the arbitration provision itself was illusory[4] and unconscionable.[5] Netco also asserted that its BSMs disputes were not within the scope of the Amway arbitration provision.

Petitioners also sought to compel Plaintiff Schmitz Associates to arbitrate under the Amway Arbitration Agreement, notwithstanding the fact that it was not an Amway distributor and did not sign any Amway distributorship agreement or arbitration provision. In an effort to avoid this generally fatal problem, petitioners attempted to bind Schmitz Associates to the supposed arbitration agreements of Netco and Charlie Schmitz under various legal theories, including third-party beneficiary, estoppel, agency and an "alter ego-like" theory. Schmitz Associates challenged each of those theories, and joined in Netco's

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[3] Amway requires its distributors to renew their distributorships annually. Netco's distributorship was annually renewed "automatically" without signing any papers.

[4] Amway reserved the right to unilaterally amend its rules at any time.

[5] Among many other things, Amway hand-picked and then trained these select arbitrators on the very substantive legal issues they would be asked to decide in arbitration. These were the only arbitrators eligible to hear disputes under the Amway Arbitration Agreement.

arguments that Amway arbitration is illusory and unconscionable and that BSMs disputes are not within its scope.

In a letter ruling, the trial court stated that the Amway Arbitration Provision was unconscionable, and therefore denied petitioners' motion to compel arbitration. (Pet. App. 33a-35a) After petitioners moved for rehearing, the trial court issued its judgment denying arbitration without explaining its decision. (*Id.* at 36a). The appellate court did not reach the Amway Arbitration Provision because it found that both Netco and Schmitz Associates were bound to arbitrate under the Pro Net Arbitration Agreement – a finding later reversed as to Schmitz Associates.

On review, the Missouri Supreme Court affirmed in part and reversed in part the trial court's denial of petitioners' motion to compel arbitration. Sidestepping the issue of whether the Amway Arbitration Provision was unconscionable as the trial court had found, the Missouri Supreme Court ruled with regard to Netco that although "it is a signatory to an Amway distributorship agreement," (*id.* at 7a), Netco was not bound to arbitrate because its claims were not within the scope of the Amway Arbitration Agreement. (*Id.*) With respect to Schmitz Associates, the Missouri Supreme Court found, applying ordinary state contract principles, that it was not bound to arbitrate under any of petitioners' asserted legal theories. (*Id.* at 4a-6a).

Importantly, neither the Missouri Supreme Court nor either of the lower courts ever even mentioned the arbitrability clause, let alone that clear and unmistakable evidence of an agreement to let an arbitrator decide

Question Presented. As is plainly evident from the face of the opinions and judgment of the courts below, not one stated that it was refusing to give effect to an arbitrability clause because it was incorporated by reference rather than expressly printed on the face of the arbitration agreement.[6] Simply stated, it was a non-issue in this case.

A. The Result Below Would Be The Same Even If An Arbitrability Clause Were Expressly Stated In The Purported Arbitration Agreement

Petitioners' real complaint has absolutely nothing whatsoever to do with whether "incorporation by reference" satisfies *First Options'* "clear and unmistakable" evidence standard. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Indeed, the result in this case would be exactly the same even if the arbitrability clause had been plainly stated in large, bold print on the face of the purported arbitration agreements. Unless and until a court first determines that a non-signatory agreed to arbitrate *something,* it logically cannot reach the question of whether that non-signatory also agreed to arbitrate arbitrability. Were it otherwise, a party could merely wave an unsigned piece of paper containing an arbitration provision and arbitrability clause, proclaim to the court that some person agreed to it and, despite the

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[6] Nor can it reasonably be inferred from the court's silence on the issue that the reason it did not perfunctorily ship this case off to arbitration as petitioners had urged was that the arbitrability clause was only incorporated by reference. As shown below, notwithstanding the existence of an arbitrability clause, the Missouri Supreme Court had a duty to first determine whether the non-signatories made an arbitration agreement before it could compel arbitration of *any* issue.

notable absence of his signature, compel that non-signatory to arbitrate something he never agreed to arbitrate. That is precisely what petitioners are attempting to do here. But this Court has re-affirmed time and again that the issue of whether a non-signatory is bound by an arbitration agreement it did not sign is an issue for the court, not an arbitrator, to decide. *See, e.g., First Options,* 514 U.S. at 944; *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84 (2002). Requiring a person to arbitrate *anything* – be it the merits or arbitrability – based on a supposed agreement that person never signed, without first finding that he is otherwise bound under ordinary contract principles, violates the first principle of arbitration: a person cannot be compelled to arbitrate something he did not agree to arbitrate. *See AT&T Tech., Inc. v. Communications Workers of America,* 475 U.S. 643, 648 (1986).

Petitioners' real contention – although not asserted in their Question Presented – is that the arbitrability clauses here completely divested the Missouri Supreme Court (and lower courts) of any jurisdiction whatsoever to determine the "existence" of an arbitration agreement – even as to non-signatories who never signed *any* writing containing an arbitration clause. Petitioners' real complaint is thus nothing more than that the Missouri Supreme Court erred in deciding the "existence" of an arbitration agreement, instead of referring that question to an arbitrator.

Although the Missouri Supreme Court did decide the "scope" of the Amway arbitration provision after finding that Netco had made an agreement to arbitrate, such was not error. It is undisputed that Amway's arbitration rules, including the arbitrability clause, were not even in existence when Netco signed its distributorship application in 1991. Amway's arbitration provision was not adopted until

1998. Netco never signed any writing after 1991 incorporating Amway's amended Rules of Conduct, and, indeed, was unaware of the existence of the unilaterally imposed arbitration provision until this litigation commenced.[7] *First Options'* "clear and unmistakable" standard cannot possibly be met under these circumstances. Thus, the Missouri Supreme Court did not err in deciding the scope of the Amway Arbitration Agreement.

In any event, petitioners' complaint that the Missouri Supreme Court decided the scope of Amway arbitration is a moot point here. The Missouri Supreme Court compelled Netco to arbitrate its claims with the other signatories to the Pro Net Agreement before the AAA. Therefore, whether Netco is also bound to arbitrate under the Amway Arbitration Provision before JAMS is a purely academic question. Obviously, Netco cannot be required to arbitrate the same claims against the same petitioners[8] in two different forums.

Even if the Missouri Supreme Court had erred in deciding the scope of the Amway Arbitration Agreement – which it did not – one court's purported error does not make a certworthy case. Recognizing this, petitioners try

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[7] Presumably, the Missouri Supreme Court found that Netco assented to Amway's arbitration provision not expressly, but rather impliedly, by the one-time renewal of its distributorship after Amway had amended its rules to require arbitration.

[8] The only petitioners who could possibly be entitled to arbitrate with Netco under the Amway agreement are Gooch, Childers and Dunn, individually – the same persons against whom Netco already must arbitrate under the Pro Net agreement. The remaining petitioners – Pro Net, Global, Gooch Support, Gooch Enterprises, TNT and Dunn Associates – are not Amway distributorships and thus not entitled to enforce the Amway Arbitration Provision.

to fit this case into a perceived conflict among *other* courts as to whether an arbitrability clause that is merely incorporated by reference provides clear and unmistakable evidence of an agreement to arbitrate arbitrability. But this case does not fit. There is a decisive difference between this case and the cases cited by petitioners that squarely present the perceived conflict. In all of the cases cited by petitioners, the party trying to avoid arbitration was a *signatory* who plainly agreed to arbitrate and who thus agreed to the terms incorporated by reference, including arbitrability clauses. *See Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 434 (S.D. 2005); *Apollo Computer v. Berg,* 886 F.2d 469, 470 (1st Cir. 1989); *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 207 (2d Cir. 2005); *FSC Sec. Corp. v. Freel,* 14 F.3d 1310, 1311 (8th Cir. 1994); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship,* 432 F.3d 1327, 1328 (11th Cir. 2005); *James & Jackson, LLC v. Willie Gary, LLC,* 906 A.2d 76 (Del. 2006).[9] In contrast, in this case, the Missouri Supreme Court was presented with *non-signatories* who never signed any writing containing an arbitration clause,[10] and therefore never expressly agreed to any

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[9] Contrary to petitioners suggestion, the Federal Circuit in *Microchip* did not express an opinion one way or the other on whether incorporation by reference satisfies *First Options*' clear and unmistakable evidence standard. *See Microchip Technology, Inc. v. Phillips Corp.*, 367 F.3d 1350, 1354 (Fed. Cir. 2004). Therefore, it does not squarely present the issue as to which petitioners perceive a conflict.

[10] Although the Supreme Court found that Netco was a signatory to the Amway *distributorship* agreement, it was not a signatory to the then non-existent *arbitration* provision. (Pet. at 7a). And the Court did not find that Netco was a signatory to the Pro Net Arbitration Agreement; instead, it bound Netco by estoppel. (*Id.* at 8a-9a).

incorporated arbitration rules, including any rule authorizing arbitrators to determine arbitrability.

In sum, this case has nothing to do with whether an arbitrability clause that is incorporated by reference satisfies *First Options'* "clear and unmistakable evidence" standard. Instead, the real issue here is whether clear and unmistakable evidence of an agreement to arbitrate arbitrability exists when such a provision is non-existent at the time the party signed the document that binds him to arbitrate. Regardless of the existence of an arbitrability clause – be it on the face of the document or incorporated by reference – a court cannot abdicate its duty to decide the gateway issue of whether a non-signatory is bound by an agreement it did not sign.

II. Petitioners Have Not Shown A True Conflict

Even if petitioners had raised a live issue, their Petition should still be denied. Petitioners cite to only one case – from the South Dakota Supreme Court – that expressly held that incorporation of an arbitrability clause by reference is insufficient to constitute clear and unmistakable evidence of an agreement to arbitrate arbitrability. *See Flandreau Pub., Sch. Dist. #50-3 v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430 (S.D. 2005). An overwhelming majority of courts, on the other hand, have held that incorporation by reference is sufficient. *See Apollo Computer v. Berg*, 886 F.2d 469 (1st Cir. 1989); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005); *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76 (Del. 2006).

A single aberration does not create the type of intolerable conflict that justifies this Court's intervention. As Justice Stevens wrote:

> [T]he existence of differing rules of law in different sections of our great country is not always an intolerable evil * * *. It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Stevens, J., *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982).

Patience in the present case may well reveal that the *Flandreau* decision will remain isolated, or be overturned. There is insufficient confusion in the lower courts now to justify this Court's intervention, even if the present case affected the perceived "conflict" in any way.

CONCLUSION

For these reasons, petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

R. DAN BOULWARE
Counsel of Record
R. TODD EHLERT
SHARON KENNEDY
SHUGHART THOMSON &
KILROY, P.C.
3101 Frederick Avenue
St. Joseph, Missouri 64506
Telephone: (816) 364-2117
Facsimile: (816) 279-3977

Attorneys for Respondents

(3)

No. 06-451

IN THE

Supreme Court of the United States

JIMMY V. DUNN, *et al.*,

Petitioners,

v.

NETCO, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF OF PETITIONERS

LARRY K. BRATVOLD
BRATVOLD LAW FIRM, P.C.
1200 East Woodhurst Drive
Building H, Suite 400
Springfield, MO 65804
(417) 887-5300

GASPARE J. BONO
Counsel of Record
STEPHEN CHIPPENDALE
MINDY L. CAPLAN
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

RULE 29.6 STATEMENT

Petitioners incorporate the Rule 29.6 disclosure statement in their petition for a writ of certiorari.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i
TABLE OF AUTHORITIES iii
ARGUMENT 1
CONCLUSION 3

TABLE OF AUTHORITIES

CASES **Page**

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 1-2

Nitro Distributing, Inc. v. Dunn,
194 S.W.3d 339 (Mo. banc 2006) 1-3

ARGUMENT

The petition demonstrated that the same question presented here is before the Court in another case decided by the Supreme Court of Missouri, *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339 (Mo. banc 2006) (hereinafter "*Nitro*"). A reply brief in support of the petition for a writ of certiorari (no. 06-446) in *Nitro* is being filed concurrently. Because *Nitro* is the lead case, petitioners incorporate the arguments set forth in the *Nitro* reply brief.

As explained in the petition, the question presented here (as in *Nitro*) arises from the irreconcilable conflict between the Supreme Court of Missouri's decision and the "overwhelming majority" (Opp. at 14) of federal circuit courts holding that the incorporation by reference of nationwide arbitration rules, adopted by the American Arbitration Association and similar well-respected arbitration organizations, providing that the arbitrator decide issues of arbitrability constitutes "clear and unmistakable" evidence of the parties' agreement to arbitrate arbitrability under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

In opposing the petition, respondents' brief is most notable for what it does not contest:

1. Respondents do not contest that the Supreme Court of Missouri in its decision below designated *Nitro* as a "companion case involving most of the same issues." (Pet. App. 1a.) Nor do they dispute that the issues in this case substantially overlap with those in *Nitro*. As a result, there is no dispute that, if certiorari is granted in *Nitro*, it also should be granted here.

2. Respondents do not contest that the Supreme Court of Missouri analyzed two arbitration agreements and determined whether the parties were bound to arbitrate pursuant to these

agreements.[1] For example, respondents admit that the court analyzed the scope of the Amway distributorship agreement in holding that respondent Netco was not bound to arbitrate under that agreement. (Opp. 4, 11.) Consequently, the Supreme Court of Missouri divested the arbitrator(s) of responsibility to decide arbitrability issues pursuant to incorporated rules. Indeed, respondents acknowledge (as the court did) that the AAA Rules are incorporated by reference on the face the Pro Net agreement and, similarly, the JAMS Rules are incorporated by reference into the Amway distributorship agreement.[2]

3. Finally, respondents do not contest that this Court has jurisdiction to consider the question presented. Instead, their arguments against certiorari are limited to defending the merits of the decision below and advancing prudential reasons not to grant the petition. These arguments merely reiterate the flawed arguments against the *Nitro* petition. For example, respondents cannot, and do not, dispute the increased use of arbitration agreements in recent years. Likewise, they do not dispute the widespread use of nationwide arbitration providers such as AAA or JAMS. Thus, respondents cannot dispute the broad impact this Court's clarification of *First Options* would have on parties across the country.

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[1] *Nitro* involves the two types of arbitration agreements at issue here as well as a third one, the Transition-to-Pro Net agreement.

[2] The Amway distributorship agreement requires adherence to the Amway Rules of Conduct, which in turn incorporate the JAMS Rules. (Pet. at 4; Pet. App. 74a-75a, 77a.)

CONCLUSION

For the reasons set forth in the petition for certiorari and this reply, the Court should hold this petition pending disposition of the *Nitro* petition, and then grant certiorari, vacate the judgment of the Supreme Court of Missouri, and remand the case for further proceedings consistent with *Nitro*.

Respectfully submitted,

LARRY K. BRATVOLD
BRATVOLD LAW FIRM, P.C.
1200 East Woodhurst Drive
Building H, Suite 400
Springfield, MO 65804
(417) 887-5300

GASPARE J. BONO
Counsel of Record
STEPHEN CHIPPENDALE
MINDY L. CAPLAN
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioners

November 13, 2006